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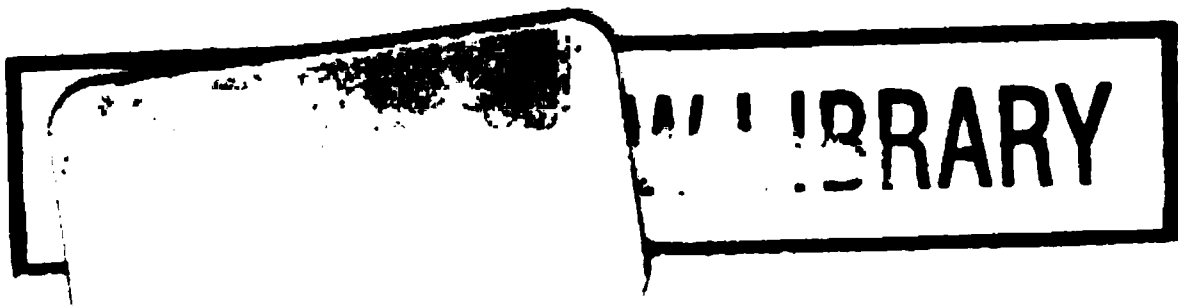
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56

WASHINGTON REPORTS

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CASES DETERMINED

IN THE

SUPREME COURT

OF

WASHINGTON

NOVEMBER 16, 1909—JANUARY 17, 1910

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ERRATA

Page 140, line 11 from top, for 102 read 202
Page 350, line 12 from top, for 29 read 39

ERRORS NOTED IN PREVIOUS VOLUMES

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Page 404, line 17 from bottom, for Reversed read Affirmed

CASES
DETERMINED IN THE
SUPREME COURT
OF
WASHINGTON

[No. 8225. Department One. November 16, 1909.]

NELLIE M. SCURRY *et al.*, *Appellants*, v. THE CITY OF
SEATTLE, *Respondent*.¹

LOST INSTRUMENTS—EVIDENCE TO ESTABLISH—SUFFICIENCY. The proof must be clear and positive to establish the contents of a lost instrument and it is not sufficient that a witness state his recollection of its legal effect, if he cannot give even the substance of its language.

Appeal from a judgment of the superior court for King county, Morris, J., entered January 14, 1909, in favor of the defendant, in an action to recover real property, upon condition subsequent, after a trial on the merits before the court without a jury. Affirmed.

James Kiefer, for appellants.

Scott Calhoun and *Stephen V. Carey*, for respondent.

FULLERTON, J.—On February 7, 1890, the appellants executed and delivered to the city of Seattle a deed conveying to the city a triangular tract of land, situated at the junction of Broadway and Terrace avenues. The deed, while it contained no covenants of warranty, contained no words of limitation of any kind. The city desired the property for the purpose of constructing an engine house thereon, and shortly after receiving the deed, did construct an engine house on the property and installed therein a fire engine and

¹Reported in 104 Pac. 1129.

other fire extinguishing apparatus. The city maintained the house as a fire station until sometime in the year 1904, when it constructed a more commodious fire station some little distance away, and moved its fire extinguishing apparatus thereto, abandoning the old house as an active fire station, although still using it as a place to store old equipment, or equipment not then in active use.

This action was begun by the appellants in 1905 to recover the property from the city. In their complaint the appellants alleged that the property was conveyed to the city on the express condition that it should remain the property of the city as long, and as long only, as it should use the same as a fire station in which it kept therein for active use a steam fire engine and hose cart as part of the fire department system of the city, which conditions, it was further alleged, although not included in the deed proper, were set forth in a separate writing and delivered to the city along with the deed and as a part thereof; and that the city had abandoned the property as a fire station and ceased to use it as such. The allegations as to the conditions on which the property was conveyed to the city were put in issue by the city, and a trial had thereon, which resulted in a judgment in the city's favor.

The writing containing the conditions on which the deed was delivered could not be produced at the trial, and the appellants sought to establish its terms by parol evidence. To prove the contents of the lost instrument, there was only one witness, the husband of one of the appellants, and his memory of the language in which the agreement was stated, although he testified that he prepared it himself, was so indistinct as scarcely to rise to dignity of proof. While he stated with clearness his understanding of the legal effect of the instrument, he did not relate even the substance of the contents of the writing itself. In order to establish a lost instrument on behalf of a party asserting rights under it, the evidence must be clear and positive, and of such a char-

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Opinion Per FULLERTON, J.

acter as to leave no reasonable doubt as to terms and conditions of the instrument. It is not enough that it be established that an instrument containing some form of limitation at some time existed, nor is it enough that some witness is able to state his understanding of the legal effect of the instrument; the contents of the instrument must be substantially proven, and with such clearness that the court can determine its legal effect from the language used therein.

The rule as to the proof required to establish a lost instrument was early announced by the supreme court of the United States in the following language:

“When a written contract is to be proved, not by itself, but by parol testimony, no vague, uncertain recollection concerning its stipulations ought to supply the place of the written instrument itself; the substance of the agreement ought to be proved satisfactorily; and if that cannot be done, the party is in the condition of every other suitor in court, who makes a claim which he cannot support. When parties reduce their contract to writing, the obligations and rights of each are described and limited by the instrument itself; the safety which is expected from them would be much injured if they could be established upon uncertain and vague impressions, made by a conversation antecedent to the reduction of the agreement.” *Tayloe v. Riggs*, 1 Pet. 591, 7 L. Ed. 275.

. So in *Nicholson v. Tarpey*, 89 Cal. 617, 26 Pac. 1101, it was said:

“The material question was as to the language of the written contract. . . . Whether lost or not, there can be no evidence, in the absence of mistake or fraud, of the intention of the parties, other than the written instrument itself. The rights of the parties must be ascertained from its terms. (Code Civ. Proc. sec. 1856.) The code expressly provides, in case of lost instruments, for oral evidence of their *contents*. (Code Civ. Proc. secs. 1855, 1870, subd. 14.) Evidence of the character received in this case imposes upon the court the construction of the contract by the witness. In *United States v. Britton*, 2 Mason 464, Mr. Justice Story remarked: ‘If no such copy exists, the contents may be

proved by parol evidence, by witnesses who have seen and read it, and can speak pointedly and clearly to its tenor and contents.' "

The supreme court of Illinois, commenting on testimony offered to prove the contents of a lost deed, uses this language:

"Fort testifies he was present when it was made; that it was read over by Jamison; that the consideration was one hundred and ten dollars; that it was for the land in dispute; but whether it was a warranty or quitclaim deed, he does not know. He professes to give no part of its contents, or even its terms, except that it was a deed for this land from Gibson to Dunn. To prove the contents of a written instrument, the vague recollections of witnesses are not sufficient to supply its place. The substance of the contract ought to be proved satisfactorily, and, if that cannot be done, the party is in the condition of every other suitor in court who has no witnesses to support his claim. When the parties reduce their contract to writing, the obligation and duties of each are described and limited by the instrument itself. The safety which is expected from them would be much impaired, if they could be established upon uncertain and vague impressions of witnesses." *Rankin v. Crow*, 19 Ill. 626.

See, also, 17 Cyc. 773 *et seq.*

Testing the evidence in the case at bar by these rules, it seems to us to fall far short of establishing the fact that the deed from the appellants to the city was accompanied with a condition to the effect that it should become void in case the city ceased to use the property therein conveyed as a fire station in which it kept and maintained for active use a steam fire engine and a hose cart, as a part of the fire department system of the city of Seattle.

The judgment appealed from will stand affirmed.

RUDKIN, C. J., CHADWICK, and GOSE, JJ., concur.

MORRIS, J., took no part.

Nov. 1909]

Opinion Per FULLERTON, J.

[No. 8096. Department One. November 16, 1909.]

H. A. JOHNSON *et al.*, Respondents, v. GEORGE ZUFELDT
et al., Appellants.¹

LANDLORD AND TENANT—LEASE—ASSIGNMENT—RESERVATIONS. The assignee of a lease is not entitled to the use of a cottage which was expressly excepted in the assignment, in the absence of fraud, deceit or mutual mistake in reserving the cottage.

LANDLORD AND TENANT — LEASES — PARTIAL ASSIGNMENT—RENT—PROPORTIONAL SHARES. Upon a partial assignment of a lease, which contained no reference to the share of the rent which the assignee was to pay, the law implies an agreement to pay a proportional share only, according to the value of the respective interests, and upon payment of the entire rent by the assignee, he is entitled to recover from the assignor the proportional part admitted by the pleadings to be chargeable to the interest of the assignor.

Appeal from a judgment of the superior court for King county, Yakey, J., entered December 18, 1908, upon findings in favor of the plaintiffs, in an action of ejectment, after a trial on the merits before the court without a jury. Reversed.

Byers & Byers, for appellants.

Sauter & Sheldon, for respondents.

FULLERTON, J.—On and prior to April 4, 1907, the respondents were the owners of a leasehold interest in certain real property, situated in the city of Seattle, on which there was standing a twenty-room rooming house or hotel, and a small five-room cottage, the rent reserved for the land and buildings being \$95 per month, payable monthly. Both buildings were fitted up for rooming purposes, and were being used by the respondents for such purposes. On the day named, the respondents sold to the appellants, giving them a bill of sale therefor, "all the household goods and kitchen furniture of whatsoever name or nature that is now contained

¹Reported in 104 Pac. 1132.

in the twenty-room rooming house known as The Argyle, . . . as per inventory, also a certain lease on the above described property satisfactorily transferred"; and at the same time, although by a separate instrument, assigned to them that part of the leasehold interest covering the twenty-room rooming house; the form of the assignment being an assignment of the entire lease with a reservation of the five-room cottage. In neither the bill of sale nor the assignment of the lease was anything said concerning the sum the assignee should pay as his proportion of the rentals accruing to the owner of the property.

The assignee took possession of the property included in the written assignment immediately on its execution. Some four days later he took possession of the five-room cottage, contending that it passed to him in virtue of the assignment, notwithstanding it was in words excepted therefrom. This action was thereupon begun by the respondents to recover possession of the cottage.

To a complaint setting out the respondents' claim of right of possession, the appellants answered, denying the respondents' right of possession and averring, by way of a separate defense, that the reservation in the lease was entered therein surreptitiously and without the appellants' knowledge or consent; further averring, by way of counterclaim against the claim for rent of the cottage set up by the respondents, that the appellants had paid the entire rental of the premises to the owner, and that no part thereof had been repaid them by the respondents; that the respondents' just proportion of such rental was \$19 per month, and that they were entitled to offset this sum against any recovery for the rental value of the cottage the court should enter against them. The reply denied that the proportionate share of the rental due from them as possessors of the cottage was of any greater value than \$8 per month.

On the issues thus made, a trial was had before the court sitting without a jury, resulting in a finding to the effect

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that the respondents were entitled to the possession of the cottage, that its rental value for the time they were out of possession was \$15 per month, or a total of \$172, and a judgment awarding this relief was entered. Both the findings and judgment were silent, however, on the question of the right of the appellants to offset against the rental value of the cottage the sums paid by them on the rent reserved in the original lease, which of right ought to be paid by the possessor of the cottage.

On the principal question, we have no hesitancy in following the findings of the trial court. The evidence wholly fails to show any fraud or deceit on the part of the respondents by which the appellants were overreached or wrongfully induced to enter into the lease, nor does it show a mutual mistake of the parties. And without some such showing, it is hardly necessary to add, the solemn agreements of the parties cannot be altered or set aside.

The court erred, however, in failing to allow an offset for a proportional share of the rent paid by the appellants reserved in the original lease. Since the assignment of the lease was only partial, and the contract between the assignor and assignee contained no reference as to the share of the rent reserved for the entire lease the assignee should pay, the law implies an agreement on his part to pay a proportional share only of the rent so reserved; the apportionment to be made between the parties according to the value of their respective interests. So, also, where in such a case one of the parties pays the entire rental the law raises an implied promise on the part of the other to repay to him the other's proportional share of such rental.

Neither party offered any evidence from which the relative rental values of the two tracts can be ascertained, and consequently the admission in the reply must be taken as the true relative value. The judgment appealed from is therefore reversed, and the cause remanded with instructions to allow the appellants to offset, against the amount recovered

against them as the rental value of the cottage during the time they were wrongfully in possession, the proportional share of the rent reserved in the lease from the owner of the property, computed at \$8 for each of the several months the appellants paid the entire reserved rental; the computation to be carried down to the time the final judgment is entered. If the amount so paid exceeds \$172, then the appellants shall have judgment against the respondents for the difference.

RUDKIN, C. J., CHADWICK, GOSE, and MORRIS, JJ., concur.

[No. 8128. Department Two. November 16, 1909.]

MILLIE FISHER, *Respondent*, v. O. E. KENYON, *Appellant*.¹

BREACH OF MARRIAGE PROMISE—QUESTION FOR JURY. In an action for breach of promise of marriage, the question of the promise is for the jury, where the evidence is conflicting and the course of conduct strongly corroborates the plaintiff.

SAME—FINANCIAL ABILITY OF DEFENDANT—EVIDENCE—ADMISSIBILITY. In an action by a woman for a breach of promise of marriage which occurred but a few months before the action was commenced, evidence of the defendant's financial ability at the time of the trial is admissible.

SAME—DAMAGES—EXCESSIVE VERDICT. A verdict for \$9,000 for breach of promise of marriage, reduced by the trial court to \$6,000, is not excessive, where it appears that the parties were engaged for two years, that defendant induced the plaintiff to remove from Montana to this state where the wedding was to take place, that she was greatly humiliated, and the defendant admitted that he was worth \$25,000, and there was evidence that he was worth several times that amount.

Appeal from a judgment of the superior court for King county, Albertson, J., entered February 5, 1909, upon the verdict of a jury rendered in favor of the plaintiff, in an action for breach of promise. Affirmed.

James T. Lawler, for appellant.

H. A. P. Myers, for respondent.

¹Reported in 104 Pac. 1127.

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Opinion Per MOUNT, J.

MOUNT, J.—Respondent brought this action to recover damages for an alleged breach of promise of marriage. Upon a trial of the case to the court and a jury, a verdict was returned in her favor for \$9,000. Upon defendant's motion for a new trial, the court required the plaintiff to remit \$3,000 from the verdict, or submit to a new trial. This remission was made, and a judgment entered against defendant for \$6,000. He appeals from that judgment.

He argues that the court erred in refusing a new trial, because (1) the evidence is not sufficient to sustain the verdict, and (2) the court allowed evidence of appellant's wealth at the time of the trial. He also argues that the judgment is excessive. There is abundant evidence of a contract of marriage in the record. While the defendant denied that there had ever been any such contract, the course of conduct of the parties, together with many circumstances in the case, strongly corroborates the testimony of the plaintiff. This question was therefore one properly for the jury, and the findings of the jury are conclusive here.

It is argued that the court erred in permitting the respondent to prove the wealth of the appellant at the time of the trial. The record shows that, at about the time the complaint was served, written interrogatories were propounded to the appellant, one of which was: "What is the reasonable value of your property?" Appellant answered: "Probably \$25,000 would be a fair estimate." At the trial, which took place about six months later, the value of appellant's property at the time of the trial was again inquired into. The rule is stated in Sutherland on Damages, vol. 3 (3d ed.), § 988, as follows:

"The evidence of the defendant's financial ability must be limited to the time the breach occurred, or to such time as he might reasonably be expected to fulfill his contract; though where the trial of the action for the breach occurs soon after the contract was made, proof may be made of the property owned by the defendant at the time of the trial."

See, also, 2 Ency. Evidence, 750; *Vierling v. Binder*, 113

Iowa 337, 85 N. W. 621; *Douglas v. Gausman*, 68 Ill. 170; *McKee v. Mouser*, 131 Iowa 203, 108 N. W. 228. In this case the date of the breach is not alleged, but the evidence of the respondent shows that the final breach occurred but a few months before the action was begun. Evidence of the financial ability of the appellant at the time of the trial was therefore admissible. It no doubt tended to show such ability at the time of the breach, and, in the absence of evidence to the contrary, is most convincing that such ability was substantially the same as at the time of the breach. The court therefore did not err in this respect.

It is also argued that the judgment is excessive. The evidence shows that the parties were engaged to be married for about two years. The respondent, at the request of the appellant, removed from her home in Red Lodge, Montana, and came to Seattle in this state, where the wedding was to take place. She was greatly humiliated. The wealth of the appellant was admitted to be \$25,000. There is evidence tending to show that he was worth several times that amount. Under these circumstances, and where the court and jury have seen and heard the parties, and a judgment has been fixed at an amount which does not appear to be unreasonable upon its face, we are not disposed to hold that it is excessive.

The judgment is therefore affirmed.

RUDKIN, C. J., CROW, DUNBAR, and PARKER, JJ., concur.

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Opinion Per Curiam.

[No. 8446. Department One. November 16, 1909.]

HALLIDIE MACHINERY COMPANY, *Respondent*, v. HAYDEN-
COEUR D'ALENE IRRIGATION COMPANY *et al.*,
Appellants.¹

APPEAL—DISMISSAL—DAMAGES ON DISMISSAL. Damages will not be granted because of the taking of an appeal for delay only, under Bal. Code, § 6522, upon confession of a motion to dismiss and failure to prosecute the appeal, where the record is not brought up and there is nothing further to show that the appeal was taken only for delay; it not being the practice to allow other than statutory costs or any special allowance for attendance.

Motion to dismiss an appeal, filed in the supreme court October 28, 1909. Granted.

B. B. Adams, for appellants, cited: 13 Cyc. 37; *Walter v. Maresch*, 3 Wash. 624, 29 Pac. 205; *State ex rel. Maltbie v. Will*, 54 Wash. 453, 103 Pac. 479, 104 Pac. 797; *Wheeler v. Commercial Inv. Co.*, 22 Wash. 546, 61 Pac. 715.

Post, Avery & Higgins, for respondent.

PER CURIAM.—Motion to dismiss the appeal, for affirmance of the judgment, and for damages upon the ground that the appeal has not been diligently prosecuted and was taken merely for delay.

The appellants confess the motion to dismiss and affirm, but resist the motion for damages. The only record before us is the motion and an affidavit showing the appeal was perfected June 12, 1909, and that no subsequent steps have been taken by appellants. The affidavit also sets forth that respondent has obligated itself to pay an attorney fee of \$100 on this appeal; that \$40 must necessarily be expended in attendance upon the court for the purpose of this motion, and that appellant has been damaged in the sum of \$200 by the annoyance, inconvenience, and delay of the appeal.

¹Reported in 105 Pac. 140.

Doubtless every appeal is a matter of annoyance, inconvenience and delay to the prevailing party. The provision of the statute, Bal. Code, § 6522 (P. C. § 1070), authorizing this court to award damages when satisfied by the record that the appeal was taken for delay only, presupposes by its terms that the delay will be manifested by the record itself. We have here no record except the motion and affidavit. We cannot assume, the only present fact being no steps subsequent to the giving of notice of appeal and filing bond, that the appeal was taken for delay merely. Many reasons might exist why further proceedings were not had. We think, therefore, the record must disclose something other than lapse of time and the annoyance incident to every appeal. It has not been the practice in this court, upon dismissal of appeals, to allow other than the statutory costs, which include an attorney's fee. We are not disposed to increase the fee so provided in the statute. Neither do we care to adopt a practice of granting a special allowance for attendance upon the court.

The motion to dismiss and affirm is granted; that for damages is denied.

[No. 7996. Department One. November 17, 1909.]

A. N. OLSON *et al.*, *Respondents*, v. PAUL H. JOHNS *et al.*,
Appellants.¹

TAXATION—FORECLOSURE—PROCESS—SERVICE OF PUBLICATION—RESIDENT DEFENDANT. The foreclosure of a tax certificate is void where there was no attempt made to personally serve the defendant, who lived in the city and whose name and address was in the city directory, and service was had by publication upon an attorney's affidavit of nonresidence and the sheriff's return of not found, made immediately upon presenting the summons at the sheriff's office without any attempt to find or serve the defendant.

Appeal from a judgment of the superior court for King county, Albertson, J., entered March 5, 1909, upon findings

¹Reported in 104 Pac. 1116.

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in favor of the plaintiffs, in an action to recover property sold for taxes, after a trial before the court without a jury. Affirmed.

Aust & Terhune, for appellants.

F. R. Conway and *A. C. MacDonald*, for respondents.

PER CURIAM.—The only question involved in this appeal is the sufficiency of the service by publication.

On October 14, 1901, an action to foreclose a certificate of delinquency was brought, naming Nelson Olson, grantor of the respondent, as defendant. The property covered by the certificate was situate in West Seattle, being two unimproved lots. Nelson Olson then, and for a long time prior thereto, lived at Ballard, and his residence was given as such in the Seattle city directory. No attempt was made to serve him personally. No search was made by the person making the affidavit of nonresidence. No attempt at a search was made by the sheriff, who made his return of "not found" immediately upon presentation to him of the notice and summons and affidavit of nonresidence. The judgment based upon such a service was void. The statute provides that, in cases of this nature, "Summons shall be served in the same manner as summons in a civil action."

In construing this language, this court held, in *McManus v. Morgan*, 38 Wash. 528, 80 Pac. 786, that the notice was to be served personally, if personal service could be made, and that service by publication could be had only when personal service could not be had. Before it can be determined that personal service cannot be made, there must be some attempt to make it. Taking the notice and summons to the sheriff's office, with an affidavit of nonresidence, and immediately obtaining a return of "not found," upon which to predicate substituted service, is not a compliance with the statute. It is hardly to be supposed the sheriff would find the defendant in his office. The plain meaning and intendment of the stat-

ute is that the sheriff shall make some search and inquiry sufficient to justify him in believing that the defendant cannot be found in the county. The attorney made no search to locate the defendant. He could hardly be in a position to give the sheriff any information as to his being or not being a resident of the county. It is suggested that the property was located in West Seattle, a sparsely settled neighborhood at that time, while Olson lived at Ballard, and a search in the vicinity of the property would not locate him. The scarcity of people in that vicinity, Olson not being among them, would doubtless have suggested to the sheriff other means of location, such as the use of the city directory, which in this instance would have located Olson and permitted personal service.

It is also suggested that the service was good under the authority of *Allen v. Peterson and Sanders*, 38 Wash. 599, 80 Pac. 849. In that case the land was located in San Juan county, and was assessed to Peterson. When the action was commenced, Peterson was dead and Sanders lived in King county. The service was made by publication. The point decided was that the foreclosure proceeding, being in the nature of an action *in rem*, might be maintained against the person to whom the property was assessed, whether or not he was the owner, and inasmuch as Peterson was the one to whom the land was assessed, and service could not be made upon him, but could be made *in rem* only by publication, that such service was sufficient as against the owner Sanders. This court has uniformly held, when the question has been before it, that, where it appears that personal service could be easily and readily had upon any attempt to so serve, service by publication is not warranted, and the judgment following such service is void. *Pyatt v. Hegquist*, 45 Wash. 504, 88 Pac. 933; *Rust v. Kennedy*, 52 Wash. 472, 100 Pac. 998; *Rust v. McManus*, 52 Wash. 699, 100 Pac. 999.

The above cases are determinative of the question here submitted, and the judgment is affirmed.

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Opinion Per MORRIS, J.

[No. 8205. Department One. November 17, 1909.]

C. E. LAWSON, *Appellant*, v. E. G. KING *et al.*, *Respondents*.¹

VENDOR AND PURCHASER—BROKERS—AUTHORITY—FRAUDS, STATUTE OF. Letters to a broker fixing a price which owners would take for their property "and let you have six months' time to sell it in," on commission, merely authorize the broker to find a purchaser, and not to make a binding contract of sale that can be specifically enforced.

Appeal from a judgment of the superior court for King county, Frater, J., entered April 17, 1909, dismissing an action for specific performance, after a trial on the merits before the court without a jury. Affirmed.

S. D. Wingate, for appellant.

Graves & Murphy and *Charles H. Winders*, for respondents.

MORRIS, J.—Action for specific performance of contract for sale of real estate, claimed to arise out of certain letters between the respondents and Vernon G. Patterson. The respondents resided at Hume, Illinois; and Patterson, a relative, was engaged in the real estate business in connection with R. C. Erskine, at Seattle. The first letter, so far as it relates to the matter before us, is as follows:

"Hume, Ill., Aug. 20, 1906.

"Dear Vernon: . . . In regard to the property, Ed said he had raised the value of his property to five thousand and let you have six months' time to sell it in. Now Vernon I don't think that is much too high according to other property there. You know an abstract will cost quite a little and your commission out it would be a little more. We will hold for five thousand unless it would be almost a cash sale. . . . Yours sincerely, Bessie King."

The appellant contends that, after the receipt of this letter, he entered into a contract for the purchase of the prop-

¹Reported in 104 Pac. 1118.

erty at \$5,000, paying \$100 down, and thereupon Patterson wrote respondents as follows:

“Seattle, Washington, Aug. 30, 1906.

“Mr. E. G. King, Hume, Ill.

“Dear Sir:—We are glad to be able to report that we have secured a buyer for your Lot 6, Block 102, D. T. Denny’s First Addition to Seattle on the following terms: \$2,500 cash and the balance in one year at 7 per cent. the property to be delivered clear of all taxes, assessments due to date, and other encumbrances excepting a first mortgage to be executed to you by the purchaser to secure the \$2,500 deferred payment. We have received \$100 as earnest money to bind the deal and the balance of the \$2,500 cash payment is to be made within five days of delivery of an abstract showing good title.

“Please send your abstract that it may be brought down to date, and also forward the enclosed deed after it has been signed and acknowledged by yourself and wife before a Notary Public. These papers may be sent either to this office or to any bank in Seattle for collection. If the abstract is sent to a bank please instruct them to have it continued to date and delivered to us and to pay our commission (5 per cent) when deal is closed.

“Thanking you for your business and trusting that our handling of it meets and will continue to merit your entire approval.

“Yours very truly, R. C. Erskine,

“Dic. V. G. P.

“By Vernon G. Patterson.”

Respondent’s reply to this letter, leaving out immaterial matter, was as follows:

“Hume, Ill., Sept. 11th, 1906.

“Dear Vernon: . . . I send you the abstract under separate cover; you have it brought up to date with the least expense possible. Will forward the deed to Lawyer Murphy as soon as we get it acknowledged. Probably in a day or so. We must have first mortgage on property, are willing to let it stand year or more as long as the man owns it we are selling to.

“Yours respectfully, E. G. King.”

Upon receipt of the abstract, the same was brought up to

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date and delivered to appellant for his examination. The next happening was the receipt of the following telegram:

“Hume, Ill., Sept. 25, 1906.

“V. G. Patterson, 712 New York Block, Seattle, Wn.

“Will not sell property, will pay commission and abstract charges. 7:23 P. M. E. G. King.”

Appellant, alleging his readiness and ability to meet all the conditions of his contract, as suggested in the letter of August 30, then brought this action, failing in which he appeals.

To state the case is to decide it. The best that can be said is that the respondents authorized Patterson to procure for them a purchaser upon the terms suggested in the letter of August 30, but such authority was not, and could not be held to be, an authorization to enter into a contract of sale which would bind respondents. There was then no contract between appellant and respondents for the purchase and sale of this property which was capable of being specifically performed. It has been so often held that it must be regarded as settled in this state that authority to a broker to procure a purchaser is not authority to enter into an enforceable contract of sale. *Carstens v. McReavy*, 1 Wash. 359, 25 Pac. 471; *Armstrong v. Oakley*, 23 Wash. 122, 62 Pac. 499; *Foss Inv. Co. v. Ater*, 49 Wash. 446, 95 Pac. 1017; *Hardinger v. Columbia*, 50 Wash. 405, 97 Pac. 445; *Hutchins v. Wertheimer*, 51 Wash. 539, 99 Pac. 577.

The above cases are decisive of this appeal, and the judgment is affirmed.

RUDKIN, C. J., GOSE, CHADWICK, and FULLERTON, JJ., concur.

[No. 8187. Department One. November 17, 1909.]

ODIN ISAACSON, *Respondent*, v. H. W. STARRETT, *Appellant*.¹

SALES—CONTRACT—ACTION FOR BREACH—DAMAGES. Upon breach of a contract to deliver an engine within a specified time, damages may be recovered, notwithstanding that performance was rendered impossible by an earthquake and subsequent strikes of employees.

Appeal from a judgment of the superior court for King county, Griffin, J., entered December 2, 1908, upon findings in favor of the plaintiff, after a trial before the court without a jury, in an action on contract. Affirmed.

Roberts, Battle, Hulbert & Tennant, for appellant.

Reynolds, Ballinger & Hutson, for respondent.

MORRIS, J.—Action to recover damages for failure to deliver a gas engine within the time provided for in the contract of purchase. The complaint alleged that, on January 16, 1906, the parties hereto entered into a parol contract, whereby appellant agreed to deliver to respondent, within sixty days, a thirty-horse power, standard gas engine, for the price of \$1,625, of which sum \$825 was paid in cash, and the balance was to be paid upon delivery. No delivery being made, action was commenced in April, 1907, to recover damages for the breach. Appellant admitted the sale of the engine, but denied any agreement to deliver same within sixty days, or any other fixed time, and set forth delivery was to be made within a reasonable time; that the engine was to have been manufactured by the Standard Gas Engine Company, of San Francisco, and that its delivery within a reasonable time was prevented because of the earthquake of April 18, 1906, which destroyed the manufacturing plant, and that subsequent strikes among the employees of the engine company further interfered with a delivery; that respondent, knowing of these facts, refused to cancel the order, but, de-

¹Reported in 104 Pac. 1115.

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Opinion Per MORRIS, J.

siring a Standard engine, expressed his willingness to wait until same could be furnished. This affirmative matter being denied in the reply, a trial was had to the court, resulting in judgment for respondent for \$690, and this appeal follows.

The \$825 paid by respondent as part payment on the engine was repaid him September 14, 1906, at which time it seems to have been admitted by both parties that the engine would not be furnished. The errors complained of are the findings made by the court and its refusal to make those suggested by appellant, it being contended that respondent could have obtained a number of other suitable engines at any time, and his damage, if any, was caused solely by his desire to have an engine of this particular make in his boat. We cannot understand upon what theory this could be a defense to the breach of the contract to deliver within the sixty days, except in so far as it might have been the respondent's duty to minimize his damages. It appears, however, to be abundantly established by the evidence that, up to September 1, appellant made frequent promises to furnish the engine, and that the repayment of the \$825 on September 14 was the first recognition of the fact by the parties that the engine would not be furnished. If the contract was as found by the court, and the evidence strongly supports such finding, the failure to deliver within the time breached the contract, and if, as contended by appellant, his performance was impossible because of subsequent happenings, he was nevertheless liable to respondent for his breach. Having assumed under his contract to deliver within a stipulated time, he was bound to make such delivery. He could have protected himself in the contract had he desired to do so, but having failed to do so, he must be held answerable for the damages caused respondent because of the broken contract to deliver. *School District No. 1 v. Dauchy*, 25 Conn. 530, 68 Am. Dec. 371, where the court says:

"We believe the law is well settled that if a person promises absolutely, without exception or qualification, that a certain

thing shall be done by a given time, or that a certain event shall take place, and that the thing to be done or the event is neither impossible or unlawful at the time of the promise, he is bound by his promise, unless the performance, before that time, becomes unlawful.”

Further along in its opinion, the court cites Chitty on Contracts (5 Am. ed.), 60, and 2 Parsons on Contracts, 184, that:

“If a party by his own contract lay a charge upon himself, he is bound to perform the stipulated act, or pay damages for the noncompletion, unless the matter was at the time manifestly and essentially impracticable.”

Such is the undoubted rule. *Anderson v. May*, 50 Minn. 280, 52 N. W. 530, 36 Am. St. 642, 17 L. R. A. 555; *School Trustees of Trenton v. Bennett*, 27 N. J. L. 513, 72 Am. Dec. 373; *Summers v. Hibbard, Spencer, Bartlett & Co.*, 153 Ill. 102, 38 N. E. 899, 46 Am. St. 872; *Central Trust Co. v. Wabash etc. R. Co.*, 31 Fed. 440; *Reichenbach v. Sage*, 13 Wash. 364, 43 Pac. 354, 52 Am. St. 51.

No question is raised as to the amount of the recovery. From the evidence it would seem to be a very modest sum, as respondent lost the use of his boat for the ensuing fishing season.

Judgment affirmed.

RUDKIN, C. J., GOSE, FULLERTON, and CHADWICK, JJ., concur.

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Opinion Per FULLERTON, J.

[No. 8426. Department One. November 17, 1909.]

INLAND NURSERY AND FLORAL COMPANY, *Appellant*, v.
H. C. RICE *et al.*, *Respondents*.¹

APPEAL—EFFECT OF TRANSFER AND STAY—JURISDICTION OF LOWER COURT—TEMPORARY INJUNCTION—PROHIBITION. After an appeal is taken from a judgment dismissing an action in which a temporary injunction had issued, and a supersedeas bond had been given to stay proceedings, the superior court is without jurisdiction to hear a motion to modify the injunction, and prohibition lies to prevent such action.

APPEAL—TRANSFER—SUPERSEDEAS OF TEMPORARY INJUNCTION—CORPORATIONS—STOCKHOLDERS. Upon appeal and stay of proceedings, whereby a temporary injunction is kept in force, restraining the respondents from participating as stockholders in meetings of a corporation, the supreme court will not modify the injunction pending the appeal, and thereby cause appellants to lose the fruits of their appeal; but will deny the application without prejudice to an action by the respondents to restrain the other stockholders from holding meetings until the appeal is determined.

Application filed in the supreme court October 25, 1909, for a writ of prohibition to the superior court for Spokane county, Sullivan, J., to restrain the hearing of a motion to modify an injunction, pending an appeal therefrom. Granted.

Peacock & Ludden, for appellant.

A. E. Barnes and *E. O. Connor*, for respondents.

FULLERTON, J.—The appellant brought an action against the respondents in which it sought to recover certain shares of its capital stock, which it alleged the respondents, while acting as trustees of the appellant, had wrongfully caused to be issued to themselves. As a part of its relief, it sued out a temporary injunction enjoining the respondents from disposing of or encumbering the stock, or from voting or otherwise representing the same at any of the corporate or stockholders' meetings of the corporation. When the cause came

¹Reported in 104 Pac. 1117.

on for final hearing before the superior court, that court ruled that the appellant had no cause of action against the respondents, and thereupon entered a judgment to the effect that the appellant take nothing thereby, and that the respondents recover their costs. The appellant thereupon gave notice of appeal to this court from the judgment so entered, and requested the court to fix the amount of the bond that would be required to keep the temporary injunction in force pending the appeal, pursuant to § 6507 of Bal. Code (P. C. § 1055). The court fixed the amount at \$5,000, and the bond was given and the appeal perfected.

Thereafter the respondents applied to the superior court for a modification of the injunctive order, in so far as it restrained the respondents from voting the stock at the meetings of the stockholders of the corporation. In response to this motion, the appellant appeared and objected to the court hearing the same on the ground that jurisdiction over the cause had been removed from the superior court to the supreme court by the appeal taken from the judgment of the superior court, and, in consequence, the court was without jurisdiction to entertain the motion. The superior court, however, notwithstanding the objection of want of jurisdiction, proceeded to hear the motion on its merits, finally taking the same under advisement. The appellant thereupon applied to this court for a writ of prohibition, prohibiting the trial court from proceeding further with the hearing on the motion.

The respondents have appeared in response to the alternative writ of prohibition, and moved this court to itself grant the relief asked for in the motion in case it holds the superior court to be without jurisdiction.

Taking up the appellant's application, we are of the opinion that the trial court was without authority to hear the motion of the respondents on its merits; and that it was its duty, when it was made to appear that an appeal had been taken from its final judgment, to refuse to consider any motion or application in the cause other than those especially

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provided for in the act relating to appeals. The granting of a motion to modify a temporary injunction, kept in force in virtue of an appeal, is not one therein provided for, and the court should have refused to consider the motion on its merits after the appellant had objected thereto, as it was without power to grant affirmative relief. Bal. Code, § 6515 (P. C. § 1063); *State ex rel. Mullen v. Superior Court*, 15 Wash. 376, 46 Pac. 402; *Irving v. Irving*, 26 Wash. 122, 66 Pac. 123; *State ex rel. Sanglin v. Superior Court*, 30 Wash. 232, 70 Pac. 484; *Aetna Ins. Co. v. Thompson*, 34 Wash. 610, 76 Pac. 105; *Kane v. Miller*, 40 Wash. 125, 82 Pac. 177.

The respondents' motion cannot be granted without denying to the appellant the benefit of its appeal should it be successful therein. We feel, however, that it would be equally injurious to the respondents' rights to permit the stockholders, without the participation of the respondents, to elect trustees and other officers of the corporation while the temporary restraining order remains in force. The denial of the respondents' motion will therefore be made without prejudice to their right to bring an action in the superior court for a restraining order should the stockholders, other than the respondents, attempt to hold a stockholders' meeting for that purpose, during the pendency of the temporary injunction.

The order of the court will be, therefore, that the writ asked for by the appellant be granted, and that the counter motion of the respondents be denied without prejudice to their right to sue for the purposes stated.

RUDKIN, C. J., CHADWICK, MORRIS, and GOSE, JJ., concur.

[No. 8263. Department Two. November 19, 1909.]

FRANK GARVEY, *a Minor etc.*, Appellant, v. JAMES BARKLEY,
Respondent.¹

VENDOR AND PURCHASER—CONTRACT—DEFAULT—FORFEITURE. Where a contract for the purchase of land provided for the payment of an installment and accrued interest on a certain date at a bank in A., and made time of the essence with the right to declare a forfeiture for default, mailing a draft at S. on the due date, for the amount due less interest, is not a sufficient tender, where three days was required for the mail to arrive at A., and notice of election to forfeit the contract may at once be given.

SAME—ESTOPPEL TO DECLARE FORFEITURE. The acceptance of the first installment upon a contract to purchase land, without accrued interest, does not estop the vendor from electing to declare a forfeiture on the purchaser's failure to pay the second installment with accrued interest, on the date it is due.

Appeal from a judgment of the superior court for King county, John C. Higgins, Esq., judge *pro tempore*, entered July 7, 1908, upon findings in favor of the defendant, in an action for specific performance, after a trial on the merits before the court without a jury. Affirmed.

William C. Keith, for appellant.

Brady & Rummens, for respondent.

PARKER, J.—This action was commenced by plaintiff to enforce specific performance of a contract to purchase certain land in Seattle. The defendant answered, praying for an affirmative decree against plaintiff forfeiting all his rights under the contract by reason of his alleged breach thereof. A trial before John C. Higgins, Esq., judge *pro tempore*, resulted in findings and a decree in favor of defendant, from which plaintiff has appealed.

The facts as found by the learned trial court, which we regard as fully sustained by the evidence, in so far as they

¹Reported in 104 Pac. 1108.

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are necessary to be noticed in determining the rights of the parties, are in substance as follows: The respondent being the owner of the land involved, on the 21st day of July, 1906, entered into a written contract with plaintiff for the sale thereof, upon terms and conditions recited in the contract as follows:

"1st. That purchase price for said land is eight hundred 00-100 dollars of which sum twenty-five 00-100 dollars has this day been paid as earnest money, the receipt whereof is hereby acknowledged by the party of the first part; the further sum of twenty-five 00-100 dollars to be paid on or before the 12th day of October, A. D. 1906, and twenty-five dollars each three months thereafter until the amount is fully paid with interest thereon from this date until paid at the rate of ten per cent per annum, payable with each quarterly payment; paid at Asotin Bank, Asotin, Washington.

"3rd. Said lands to be conveyed by a good and sufficient deed with abstract of title to the said party of the second part when said purchase price shall have been fully paid;

"4th. Time is the essence of this contract, and in case of failure of the said party of the second part to make either of the payments or perform any of the covenants on his part, this contract shall be forfeited and determined at the election of the party of the first part; and the party of the second part shall forfeit all payments made by him on this contract, and such payments shall be retained by the said party of the first part in full satisfaction and liquidation of all damages by him sustained; and he shall have the right to re-enter and take possession of said lands and premises and every part thereof."

Twenty-five dollars was paid upon the execution of the contract as therein provided, and twenty-five dollars was paid thereon October 12, 1906. By the terms of the contract the sum of twenty-five dollars and accrued interest became due thereon January 12, 1907. In the usual course of the mail, letters mailed at Seattle will arrive at Asotin on the third day thereafter. On January 12, the day on which the twenty-five dollar installment and accrued interest became due, appellant caused to be mailed at Seattle, a letter inclosing a draft for

twenty-five dollars addressed to the Asotin bank, to apply upon the purchase price of the land, which was not received at the bank until January 17. On January 11, respondent directed the Asotin bank, that unless the whole amount to become due under the terms of the contract on January 12, was received by the bank on that day, it should not receive the same for the use of respondent. On January 16, prior to the receipt by the bank of the twenty-five dollar draft sent by appellant, the respondent wrote and mailed to appellant the following letter, which was received by him in due course:

“Asotin, Washington, January 16th, 1907.

“Frank Garvey, Esq., Seattle, Washington.

“Dear Sir:—You are hereby notified that you have failed to comply with the terms of your contract with me under date July 26th, 1906, for the purchase by you from me of lots nine (9), ten (10), eleven (11) and twelve (12) of block thirty-six (36) of the re-plat of the Green Lake Home Addition to the City of Seattle, King County, Washington, in this that you have failed to make the quarterly payment with interest, as provided in the first paragraph of our contract, when the same became due this present month.

“Therefore, in accordance with the terms of the 4th paragraph of said contract, by reason of your failure to make the above stated payment, I hereby elect to forfeit and determine all your rights and interests arising out of said contract and will keep and retain all sums of money by you paid thereon as liquidated damages as provided in said contract. Very respectfully.

James Barkley.”

On the following day, January 17, immediately upon the receipt of the twenty-five dollar draft sent by appellant, the bank returned the same to him as directed by respondent. Upon the receipt of the letter from respondent declaring the forfeiture of the contract, the appellant forwarded to the Asotin bank a draft payable to the order of respondent for a sum equal to the twenty-five dollar installment and accrued interest due January 12, which was refused, and returned to appellant as directed by respondent. The parties were com-

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parative strangers to each other, the appellant living at Seattle and the respondent near the town of Asotin.

That the purchaser wholly failed to perform the conditions of the contract upon his part, according to its plain terms, by failing to pay the installment and interest falling due January 12, at the Asotin bank, seems too plain for argument. Even if the mailing of the draft at Seattle on the day the installment fell due should be regarded as a sufficient tender, so far as time alone is concerned (which we think it was not under the plain provision of the contract making it payable at the Asotin bank), still the amount of the draft was not equal to the sum then due, in that it did not include interest, and hence would not be a sufficient tender even if in time. Before the next attempted tender was made, and while appellant was clearly in default, respondent had elected to declare the contract and all of appellant's rights thereunder forfeited, and had given appellant formal written notice thereof, which had been received. Contracts of this nature have uniformly been upheld by this court and given full force according to the plain import of their language. *Drown v. Ingels*, 3 Wash. 424, 28 Pac. 759; *Wilson v. Morrell*, 5 Wash. 654, 32 Pac. 733; *Pease v. Baxter*, 12 Wash. 567, 41 Pac. 899; *Jennings v. Dexter Horton & Co.*, 43 Wash. 301, 86 Pac. 576.

It is argued by learned counsel for appellant that respondent is estopped from claiming a forfeiture for the reason that he accepted the installment falling due October 12, without added interest then due—that is, he accepted part of what was then due. It is no doubt true that he was thereby estopped from claiming a forfeiture by reason of that particular default in the payment of interest, without first giving appellant notice and a reasonable opportunity to pay that interest, but it does not follow that because of default in whole or in part as to one installment, and forbearance by the seller on account thereof, he thereby waives his right of forfeiture as to subsequent installments. We do not think the

acceptance of the one October installment, without added interest then due, was a waiver on the part of respondent to insist upon his right of forfeiture by reason of default in future installments, according to the strict terms of the contract. *Cash v. Meisenheimer*, 53 Wash. 576, 102 Pac. 429. It may be that repeated forbearance of his right of forfeiture under the strict terms of the contract by acceptance of defaulted payments might constitute sufficient evidence to warrant the court in holding he had thereby waived his right of forfeiture without previous notice, but such is not this case.

The case of *Stein v. Waddell*, 37 Wash. 634, 80 Pac. 184, cited by appellant's counsel, is not applicable to the facts here. In that case one of the installments became due August 3, 1903. Thereafter payment of a portion of that installment which was then in default was accepted, and before the next installment became due, suit was commenced by the seller to declare a forfeiture. The only default upon which the right of forfeiture could be based was waived by the acceptance of part payment on the installment in default. In this case respondent is not depending upon a defaulted installment part payment of which has been accepted by him. He is depending upon a default in the installment of January 12, which has not been paid according to the plain terms of the contract, and his right of forfeiture has not been waived by accepting part payment thereon or in any other manner. We have seen that his acceptance of the October installment without the interest did not affect his rights which might arise by reason of future defaults.

We are of the opinion that the learned trial court correctly determined the rights of the parties, and its decree is therefore affirmed.

RUDKIN, C. J., MOUNT, CROW, and DUNBAR, JJ., concur.

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[No. 8477. Department Two. November 20, 1909.]

THE STATE OF WASHINGTON, *on the Relation of W.C. Gibson,*
Plaintiff, v. MITCHELL GILLIAM *et al., as Judges of the*
*Superior Court for King County, Respondents.*¹

GRAND JURY—DRAWING AND SUMMONING—TIME FOR SERVICE—STATUTES—CONSTRUCTION. Laws 1909, p. 133, § 5, providing that grand jurors shall be “drawn from the jury list as hereinbefore provided” (for the drawing of petit juries), has no application to the portions of the preceding section requiring monthly jury terms and fixing the time for the commencement of the term on the first Monday of the ensuing month; hence it is within the discretion of the court to summon a grand jury to serve on the 22d of the same month.

SAME—STATUTES—IMPLIED REPEAL. Laws 1905, p. 270, § 4, requiring the drawing of a grand jury to serve during the ensuing three months, is impliedly repealed by Laws 1909, p. 133, a complete act purporting to cover the whole subject of selecting and summoning grand and petit jurors.

Application for a writ of prohibition filed in the supreme court November 17, 1909, to restrain the superior court for King county from summoning a grand jury. Writ denied.

Kenneth Mackintosh, for relator.

George F. Vanderveer, for respondents.

PARKER, J.—By this proceeding the relator, as a taxpayer, seeks a writ of prohibition directed against the respondents, commanding them to desist from summoning a grand jury, which it is alleged they are unlawfully proceeding to do. The facts are undisputed, the question presented being only as to whether or not the manner in which the respondents are proceeding is lawful. The record shows the following:

On the 13th, being the second Saturday, of November, 1909, the judges of the superior court for King county entered an order directing the clerk of that court to draw from

¹Reported in 104 Pac. 1131.

the jury boxes, as required by law, twenty-four names of persons to serve as grand jurors in said court, which was then and there done by the clerk accordingly. Whereupon the court caused a venire to be issued summoning said jurors, which was by direction of the court made returnable into court on Monday, November 22, 1909. It is not contended that there was any irregularity in any of the proceedings, other than in the fixing of the date for the return on Monday, November 22, the contention based upon this fact being that, under the law, the superior courts have no power to impanel a grand jury unless the same be ordered and drawn on the second Saturday of the calendar month preceding the month in which the jury is to serve, and that a grand jury drawn and impaneled during the same month, or impaneled prior to the first Monday of the month succeeding the drawing, would not be a legally constituted body, and thus be an unwarranted burden upon the taxpayer. Learned counsel for relator rests his contention upon the provisions of sections 4 and 5, page 133, Laws of 1909, which are as follows:

"Sec. 4. Jury terms shall commence on the first Monday in each month, unless postponed to a later date by order of the judge or judges of the superior court, but it shall not be necessary to call a jury for any month in any county unless the judge or judges of the superior court of that county shall consider that there is sufficient business to be submitted to a jury to require that one be called. When the judge or judges of the superior court of any county shall deem that the public business requires a jury term to be held, he or they shall require the county clerk to draw a jury to serve for the ensuing month. The county clerk on the second Saturday of the calendar month preceding the month on which the jury is to be called to serve, shall be blind-folded and in the presence of the judge or judges of the superior court, shall draw from the jury boxes such number of names as the judge or judges may have ordered to be summoned as jurors for the ensuing month. The names shall be drawn in equal number from each jury box, and before the drawing is made the box shall be shaken up so that the slips bearing names thereon

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may be thoroughly mixed, and the drawing of the slips shall depend purely upon chance. The names of persons so drawn to serve as jurors shall be struck from the jury list by the county clerk, and they shall not be called to serve as jurors for five years thereafter, unless their services shall be necessary because there are not sufficient competent jurors to be found within the county who have not served within that time.

“Sec. 5. Whenever the judge or judges of the superior court of any county in the state shall desire to summon a grand jury, the names of persons to serve as grand jurors shall be drawn from the jury list as hereinbefore provided:
.”

It is argued that section 5, by reference to the preceding provisions relating to drawing trial juries, determines not only the manner and time of drawing grand juries, but also determines the time when the grand jurors shall be summoned to appear in court and be impaneled. We are unable to agree with this contention. The language of section 5 is, “*The names of persons to serve as grand jurors shall be drawn from the jury list as hereinbefore provided.*” No doubt this refers to the provisions of section 4 so far as the matter of drawing is concerned, since no other provisions of the act relate to that subject; but these words of section 5 only refer to preceding provisions of the act relating to the single matter of drawing the names of persons to serve as grand jurors from the jury list, and make no reference to the time of the appearing in court and impaneling of the grand jury. All the provisions of the act in any way bearing upon the question involved are those above quoted. We are of the opinion that the matter of time for the appearance in court and the impaneling of the grand jury is within the discretion of the superior court, since the law is silent upon that subject.

While counsel seems to rest the claims of the relator upon the construction of the above quoted law contended for, it is suggested that the provisions of the jury law of 1905 (Laws

1905, p. 270), are still in force so far as fixing the times for impaneling grand juries are concerned. It is true that section 4 of that law seemed to require the drawing on the second Saturday of the month for any grand jury which is to serve during the ensuing three months, but we are of the opinion that law is repealed by the law of 1909, above quoted from, although the latter does not by express terms repeal the former. Each of these laws is complete within itself, and purports to cover the whole subject-matter of selecting and summoning jurors both grand and petit. In such case the later law has the effect of repealing the whole of the former, even though the former may provide for some things not covered by the latter. *Mansfield v. Bank*, 5 Wash. 665, 32 Pac. 789, 999; *Leavitt v. Chambers*, 16 Wash. 353, 47 Pac. 755; *Stetson & Post Mill Co. v. Brown*, 21 Wash. 619, 59 Pac. 507, 75 Am. St. 862; *Nelson v. Nelson Bennett Co.*, 31 Wash. 116, 71 Pac. 749; 26 Am. & Eng. Ency. Law (2d ed.), 731.

We conclude that there are no facts in this record showing that the defendants are proceeding unlawfully. The writ is denied.

RUDKIN, C. J., MOUNT, DUNBAR, and CROW, JJ., concur.

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[No. 8259. Department One. November 20, 1909.]

HENRY WOLK, *Respondent*, v. GRANT SMITH *et al.*,
Appellants.¹

MASTER AND SERVANT—ASSUMPTION OF RISKS—PROMISE TO REPAIR—VICE PRINCIPALS—EVIDENCE—SUFFICIENCY. A timekeeper or clerk, who gave a promise to repair a chain, during the absence of the general foreman, was not a superintendent or vice principal as to the plaintiff, a stone mason, who was injured by the breaking of the chain, where it appears from plaintiff's evidence that one A. was the general foreman, that when A. was absent there was no one to give orders to the plaintiff, who was foreman of his derrick crew, although he stated that when A. was away the clerk took his place and was "timekeeper and foreman the way I called him," and where the other evidence showed that the clerk was merely a timekeeper in charge of the accounts and supplies and had no part in the work nor any authority over it or the tools, that when a chain was broken (which happened frequently) the men got a new one or repairs from the blacksmith or used a cold-shut, on their own motion or by direction of the plaintiff, and that plaintiff and the clerk each had authority to hire men in the absence of the general foreman; hence the plaintiff cannot avoid the assumption of risks from the use of a defective chain upon the clerk's promise to repair the same (FULLERTON, J., dissenting).

Appeal from a judgment of the superior court for King county, Tallman, J., entered March 12, 1909, upon the verdict of a jury rendered in favor of the plaintiff, for personal injuries sustained by an employee in charge of a derrick. Reversed.

Robertson, Miller & Rosenhaupt, for appellants.

Roberts, Battle, Hulbert & Tennant, for respondent.

MORRIS, J.—The appellants were engaged in building a sea wall between Seattle and Everett, for the Great Northern Railway Company, and respondent was in charge of one of

¹Reported in 105 Pac. 138.

the derricks that were used in lifting the stone and placing it in its proper place in the wall. On the day of respondent's injury, a chain used in wrapping the rock broke, letting the rock fall, and respondent was injured. The respondent first noticed that this chain was defective on the day previous to the accident, and the theory of the respondent is that on that day he called the attention of one Helliesen, whom he alleges was the superintendent of appellants, to this defective chain, and that Helliesen agreed and promised to repair it or replace it with a new one, and relying upon this promise he continued at work until his injury, believing at the time of the injury that the defect had been repaired. The appellants denied any negligence, and set up assumption of risk and contributory negligence. Upon the trial plaintiff recovered, and the case is brought here with numerous assignments of error. The court's failure to sustain appellants' challenge to the sufficiency of the evidence and motion for judgment will be the only one we will consider.

It appears from the evidence that the general foreman in charge of the work was Mr. Armstrong; that in charge of each derrick was a stone mason, whose duty it was to select the stone, convey it by means of the derrick to the wall, and see that it was properly placed therein. In this work he was assisted by several men who were under his directions. Respondent was the stone mason in charge of one of these derricks. His relation to the work can best be described by his own testimony. He says Armstrong was the general foreman, but that he (respondent) was supposed to look after the wall; that he never was instructed there was any other foreman; and that in the absence of Armstrong there was no one to give him orders. He had general supervision over his derrick crew.

At the time of the accident, Armstrong was not at the work, and respondent says that, when he discovered the defective chain the day before the accident, he spoke to Helliesen and told him he could not use that chain because some

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of the links were worn and dangerous to use; that Helliesen told him he could not give him another chain, but that he would get that one fixed, and to "go ahead and work." He says, when asked who Helliesen was, that he was the man who took Armstrong's place, when Armstrong was absent; "he was timekeeper and foreman, the way I called him." All the other evidence was to the effect that Helliesen was only a timekeeper, and bookkeeper; that in addition he had charge of the supplies and furnished the men with tobacco, overalls, etc.; that he had no part at all in the doing of the work, nor any authority as to the manner of its construction, nor of the tools and appliances used; that in the absence of Armstrong, these matters were in charge of the stone mason who acted as boss or foreman over each derrick crew. Armstrong says that Helliesen was authorized by him to order any tools or supplies needed by the derrick men which were not at hand, but this was done because he was the bookkeeper or clerk; that he had no independent authority to do this except as he was authorized by him upon the request of the derrickmen. It also appeared that, in the absence of Armstrong, he had been authorized to hire men when needed. Respondent had the same authority. He received \$80 per month while respondent was paid five dollars a day. The testimony of the other members of the derrick crew was that the stone mason was the boss of each crew, and when chains needed repair or new ones were required they obtained them from the blacksmith; that frequently respondent directed them to do so; at other times they did so on their own motion.

It is apparent from the entire record that Helliesen was not a superintendent or foreman of the appellant; nor did he occupy any such relation to appellant as to make him a vice principal. He was nothing more than a clerk in charge of the accounts and supplies. He had nothing to do with either the doing of the work or the selection of appliances, which rested entirely under the direction of Armstrong, and

in his absence respondent, as foreman or head man of his derrick crew, was his own boss.

This court has gone as far as any court in defining vice principals, but in each case the vice principal was doing the work or performing the duty imposed by law upon the master, under the authority and direction of the master. Helliesen, who denied the conversation with respondent, is not shown to have had any such authority, nor to have been given any such direction. He had nothing to do with the manner of conducting the work. He gave no directions. He selected none of the appliances used. Nor was he in any way related to the work as to either time, place, material, tools, direction, or any other relation generally assumed by the master or his vice principal. The wages paid the two men—\$80 a month to Helliesen and five dollars a day to respondent, is a circumstance, perhaps slight, but showing to some extent the relative positions occupied by them in this work. While as between the conflicting statements of respondent and Helliesen as to Helliesen's alleged promise to repair the chain or supply a new one, we cannot decide, it being a contested question of fact to be determined by the jury alone; yet we may determine whether there is any evidence to warrant a finding that Helliesen was a vice principal or was clothed with any authority to bind the appellants upon his promise to repair, so as to bring the case within the rule contended for by respondent. We can find no such evidence. On the other hand, there does not appear to be any dispute but that the men in this crew took it upon themselves to procure their own chains from the blacksmith when needed, or to use cold-shuts which had been provided by appellants for temporary use, and that they were at times directed to do so by respondent. Before the appellants could be charged with the acts of Helliesen, it must appear that he was acting within the scope of his authority; that he was doing something they had clothed him with apparent authority and direction to do, and there is no evidence in this case that he had any authority or

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direction at all over the appliances used in the work. The fact that respondent testified Helliesen was a foreman and gave directions did not furnish any evidence to submit that question to the jury, as such testimony was a mere conclusion of the respondent. Helliesen's authority on the work and the extent to which he could bind appellants must be determined from the relation he bore to the work, what was done by him, what was said by him, which was apparently authorized or acquiesced in by appellants, and not by the name or character that respondent might give him in his testimony. Agency when it has become a triable issue must be proved, as any other fact is proved. It is not proved by evidence that the person dealing with him thought he was an agent or called him an agent, or that he assumed the authority of an agent.

Hence, assuming there was a promise to repair, it was not made by the master nor any vice principal, nor could it bind the master. There is no dispute but that respondent had charge of the derrick and its crew, nor that the men whenever they wanted a tool or a chain repaired, took them down to the blacksmith, or made use of one of the cold-shuts. They did not require any authority or permission from any one to do this. The chains broke frequently, and the men as frequently had them repaired, and except the testimony of respondent, the only evidence of any direction given the men was such as was given by respondent. Being of such a frequent occurrence, all the men knowing it, danger from a broken chain was one of the open dangers and ordinary risks of the work, and the rule of assumption of risk would apply, unless there was something to bring the case within some recognized exception, which the evidence in this case does not disclose. If there was any evidence that appellants had assigned the duty of inspecting chains and repairing them, or replacing them with new ones, to Helliesen, then, while so engaged, whatever may have been his general employment or by whatever rank or title his position was known, he would

have been the representative of appellants. It is not a question of rank among the different employees, but it is a question of the character of the act, and the servant or employee who is delegated by the master to perform a duty which the law imposes upon the master is, in the performance of such duty, the *alter ego* of the master, and his act is the master's act. There is no such case before us, and the law cannot supply what the facts omit.

The court below should have sustained appellants' challenge to the evidence, and granted the motion for judgment. Its refusal to do so was error.

The judgment is reversed, and the cause remanded with directions to dismiss.

RUDKIN, C. J., CHADWICK, and GOSE, JJ., concur.

FULLERTON, J. (dissenting)—In my opinion there was error in the record requiring a new trial, but I am unable to concur in the conclusion that the evidence was insufficient to justify a verdict for the plaintiff. I therefore dissent.

[No. 8366. Department One. November 22, 1909.]

JOHN W. WINNINGHAM, *Appellant*, v. W. W. PHILBRICK,
Respondent.¹

APPEAL—REVIEW—PARTY ENTITLED TO ALLEGE ERROR—RESPONDENT NOT APPEALING. Upon appeal by plaintiff from an order granting a new trial, the defendant cannot, without having appealed, allege error in not having dismissed the case for want of jurisdiction of the subject-matter of the action, upon defendant's motion, as the ruling becomes the law of the case.

NEW TRIAL—CONDITIONAL GRANT—EXPIRATION OF CONDITION. Upon the expiration of the time limited within which a remission of part of a verdict could be accepted to avoid a conditional grant of a new trial, the order for a new trial becomes absolute and finally fixes the rights and status of the parties without further orders.

¹Reported in 105 Pac. 144.

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NEW TRIAL—GROUNDS—EXCESSIVE VERDICT. It is the duty of the trial court to grant a new trial where the verdict is so excessive as not to be sustained by the evidence.

APPEAL—REVIEW—GRANT OF NEW TRIAL. The grant of a new trial because of an excessive verdict will not be disturbed on appeal where abuse of discretion is not shown.

APPEAL—DECISION—AFFIRMANCE—GRANT OF NEW TRIAL—CONDITIONS. Upon affirming an order granting a new trial unless an excessive verdict is remitted, and which became absolute by failure to comply with the condition, the supreme court cannot allow the appellant to make the remission and accept the verdict as reduced.

Appeal from an order of the superior court for King county, Gay, J., entered March 24, 1909, granting defendant's motion for a new trial, in an action for slander of title, after a trial on the merits and the verdict of a jury rendered in favor of the plaintiff. Affirmed.

John H. Allen, for appellant.

Higgins, Hall & Halverstadt, for respondent.

MORRIS, J.—Each of the parties hereto is the patentee and owner of patents for cutter-heads and matcher-heads. The appellant brought the action, contending that the respondent had slandered his title by maliciously and falsely stating to divers persons that the Winningham head was an infringement upon the Philbrick head, and setting forth his damages. Respondent denied the charge of malice and falsity, admitted stating to different persons that the Winningham head was an infringement upon his patent, and set forth such infringement. Upon the trial a jury was called, and on January 26, 1909, a verdict was returned in favor of appellant in the sum of \$4,000.

Thereupon respondent moved for a new trial upon various grounds, one being that the verdict was excessive. The court, in ruling upon this motion, made an alternative order, granting a new trial unless the appellant would within five days file a waiver of all sums in excess of \$452. There seems to

have been some misunderstanding as to the language of this order, after its announcement by the court, and appellant filed a petition for a rehearing, which was denied, and on March 24 the court handed down and filed a memorandum decision, in which, after reciting the making of the previous order, the petition for a rehearing, and other matters, it rules "that the petition for a rehearing is denied and the original order granting a new trial, unless all sums above four hundred fifty-two dollars (\$452) shall be remitted, is allowed to stand as of this date." The five days granted appellant to determine whether he would accept the \$452 or submit to a new trial expired, and the record discloses no further action until April 5, which was twelve days after the entry of the court's order, when appellant served notice of appeal from the order of the court "granting the defendant a new trial herein."

The errors assigned are, "In directing a remission of \$3,548 of the verdict," and "In granting the motion for a new trial upon refusal of plaintiff to make such remission." In the briefs many interesting questions are discussed which we will not inquire into, as, in our view, the same are not properly before us; the jurisdiction of the court below being attacked upon the ground that, inasmuch as it was incumbent upon appellant before he could recover to establish the falsity of the charge, he must prove that his head was not an infringement upon the Philbrick head; and respondent contends that such a question can only be determined in the Federal courts. It is likewise asserted that the communication was privileged, and that the court erred in permitting the verdict to stand in any amount, because of insufficiency of the evidence. Respondent, however, has not appealed, and it has long since become the established rule in this court that we will not review any order or ruling made by the court below unless the appeal is presented by the party aggrieved. If, therefore, respondent desired this court to review the ruling of the court below upon the questions submitted in his

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brief and upon which the ruling below was adverse to him, he should have taken a cross-appeal, failing which the rulings thereon of the court below become the law of this case, and we are precluded from reviewing them. *Rockford Shoe Co. v. Jacob*, 6 Wash. 421, 33 Pac. 1057; *Langert v. David*, 14 Wash. 389, 44 Pac. 875; *Tacoma v. Tacoma Light & Water Co.*, 16 Wash. 288, 47 Pac. 738; *Id.*, 17 Wash. 458, 50 Pac. 55; *Phillips v. Reynolds*, 20 Wash. 374, 55 Pac. 316, 72 Am. St. 107.

The only question before us upon this appeal is that suggested by appellant, that the court erred in granting a new trial. When appellant permitted the time fixed by the court, in which he must accept a reduction of his verdict or submit to a new trial, to elapse without accepting such reduction, respondent's right to a new trial became absolute without any further order upon the part of the court; and such order was, at the time of the taking of the appeal, the only order of force and effect in the matter. It has long since been established that when, upon ruling upon a motion for a new trial, the court grants or refuses a new trial upon conditions set forth in the order, the compliance with the condition within the time fixed, or the failure to comply within the time fixed, operates as an absolute grant or denial of the new trial, and the status and rights of the parties become finally fixed and determined as of such right. *Harris v. Central of Georgia R. Co.*, 103 Ga. 495, 30 S. E. 425; *Sherman v. Mitchell*, 46 Cal. 576; *Garoutte v. Haley*, 104 Cal. 497, 38 Pac. 194; *Brown v. Cline*, 109 Cal. 156, 41 Pac. 862; *Adams Express Co. v. Gregg*, 23 Kan. 376; *Buntain v. Mosgrove*, 25 Ill. 152, 76 Am. Dec. 789; *Chambers' Adm'r v. Bass*, 18 Ind. 3.

Not only was the lower court, if in its judgment the verdict was so grossly excessive as to demand a reduction from \$4,000 to \$452, justified in granting a new trial, but it was its plain and manifest duty to do so. It is the duty of the trial court to protect the rights of litigants before it, and

while it is the sole province of the jury to pass upon disputed questions of fact, it is equally the province of the trial court to relieve a litigant from a verdict which in its opinion there is no evidence to sustain.

A like question was submitted to this court in the case of *Kohler v. Fairhaven & N. W. R. Co.*, 8 Wash. 452, 36 Pac. 253, 681, wherein it is said:

“Under the provisions of our statute it is made the duty of the trial court, when a proper motion has been interposed, to determine the question as to whether or not the damages awarded by the jury are excessive. In performing this duty the court must determine as to the effect of the evidence introduced in the course of the trial. From such evidence it must, as a question of judicial discretion, determine whether or not the damages as assessed by the jury are so excessive as to make it appear that they were awarded under the influence of passion or prejudice. It is a universal rule that when a matter is left to the discretion of a court, its exercise of such discretion will not be interfered with by an appellate court unless it is made affirmatively to appear from the record brought up on appeal that such discretion has been improperly exercised. . . . For while it is true that the verdict of a jury is presumably warranted by the evidence until the contrary is made to appear, the statute has made it the duty of the lower court to review their action, and when it has done so, and in the exercise of the discretion vested in it, determined that it was not warranted, the presumption as to its correctness is taken away, and the decision of the court must stand unless the appellate court is satisfied from all the circumstances surrounding the case that in so deciding the court made a mistake.”

See, also, *Clark v. Great Northern R. Co.*, 37 Wash. 537, 79 Pac. 1108; *Morris v. Warwick*, 42 Wash. 480, 85 Pac. 42; *Norman v. Bellingham*, 46 Wash. 205, 89 Pac. 559.

We find nothing in the record before us to convince us that the court below abused the discretion vested in it to grant a new trial when, in its judgment, there was no evidence to justify the verdict as returned by the jury.

Appellant requests that, in case we find “that \$452 is

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ample compensation to the plaintiff," we allow him the refusal of that sum for thirty days. We can make no such order. The only question we may determine upon this appeal is the alleged error of the court below in granting a new trial. Appellant had his opportunity to accept such sum and refused it. Having done so, the order for a new trial became absolute, and upon a review of that order, having found the court was without error and the order appealed from should be affirmed, we cannot substitute in its stead a new order, imposing other conditions than those fixed by the court below. To do so would in effect operate as a reversal of the order appealed from, and the entry of an original order with new conditions. The only thing we may do is to affirm or reverse the order appealed from. *Kohler v. Fairhaven & N. W. R. Co., supra.*

The judgment is affirmed and the cause remanded for a new trial.

RUDKIN, C. J., FULLERTON, GOSE, and CHADWICK, JJ., concur.

[No. 8397. Department One. November 22, 1909.]

JAMES KIEFER, *Respondent*, v. MARCELLUS LARA *et al.*,
*Appellants.*¹

ATTORNEY AND CLIENT—ACTION FOR SERVICES—EVIDENCE OF EMPLOYMENT—ADMISSIBILITY. In an action to recover for legal services rendered in an action against defendant and a corporation, upon an issue as to whether the contract of employment included the defense of the action on behalf of the corporation; it is error to exclude defendants' offer in evidence of a complaint in a former action against the defendants, for the same services, which alleged that the plaintiff was employed by the defendants to defend "for them," as claimed by defendants, as it tended to support the defendants' contention that the plaintiffs were not employed to defend for the corporation.

SAME—INSTRUCTIONS. In an action to recover for legal services rendered in the defense of an action assailing the title of the de-

¹Reported in 104 Pac. 1102.

fendants, and of their grantee in a warranty deed made by the defendants, in which there was an issue as to whether the defendants had employed the plaintiff to defend the action on behalf of such grantee, it is erroneous and misleading to instruct the jury that a general warranty deed runs with the land and binds the grantor to defend his title or estate, when the defendants were defending their title; as such defense would inure to the benefit of the grantee and they were under no obligation to employ counsel for the grantee.

Appeal from a judgment of the superior court for King county, Ronald, J., entered May 21, 1909, upon the verdict of a jury rendered in favor of the plaintiff, in an action for legal services, after a trial on the merits. Reversed.

John G. Barnes, for appellants.

C. A. Riddle, for respondent.

RUDKIN, C. J.—This was an action to recover the reasonable value of services, alleged to have been performed by the plaintiff at the special instance and request of the defendant Marcellus Lara, in the case of *Johnson v. Lara*, 50 Wash. 368, 97 Pac. 231. The complaint contained two causes of action; the first for services performed in the superior court; the second for services performed on appeal to this court. The case was tried before a jury, and from a judgment on a verdict in favor of the plaintiff in the sum of \$2,000, this appeal is prosecuted.

There was a direct conflict in the testimony as to the terms of the contract of employment. The respondent testified that he was employed by the appellant Marcellus Lara to defend that action, not only on behalf of Lara and wife, but also on behalf of their codefendant, the Seattle Country Club. Marcellus Lara, on the other hand, testified that he employed the respondent to appear in that action on behalf of himself and wife alone, and that the name of the Seattle Country Club was not referred to or mentioned. In his complaint in this action the respondent set forth his contract of employment in these words:

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“That in the month of April or in the first days of May, 1907, the defendants employed plaintiff to defend a certain action then pending in the superior court of King county, state of Washington, wherein J. B. Johnson was plaintiff and the defendants herein and the Seattle Country Club, a corporation, were defendants in which action specific performance of a certain contract between the defendants herein and the said J. B. Johnson, for the sale and purchase of certain real estate was sought to be enforced, and it was then agreed between the plaintiff and the defendant herein Marcellus Lara, acting for himself and his wife, that the plaintiff herein should defend said action both for the defendants herein and for said Seattle Country Club, and that said defendants herein would pay the plaintiff herein for his services, in said action wherein said Johnson was plaintiff, rendered both to the defendants herein and to the said Seattle Country Club, as the said Seattle Country Club claimed a title to said premises under a deed from the defendants herein, containing covenants of warranty.”

It appeared at the trial that, prior to the commencement of the present action, the respondent commenced another action against the appellants to recover for the same services in the superior court. In the complaint in that action the contract of employment was thus alleged: “That in the month of April, 1907, the defendants employed plaintiff to defend for them a certain action in the superior court of King county, state of Washington, wherein J. B. Johnson was plaintiff and the defendants herein and others were defendants.” The court sustained an objection to the introduction of the latter complaint in evidence at the trial, and this ruling is assigned as error. The assignment must be sustained.

The respondent did not appear for the Laras in the supreme court, and could not recover from the Laras for services performed in that court for the Seattle Country Club, unless such services were embraced in his contract of employment. The question whether the contract of employment included services performed for the Seattle Country Club

was therefore a vital one in the case, and there is a substantial and material difference in the allegations of the two complaints on that question. The complaint in the first action alleged that the appellants employed the respondent to defend *for them*, while the complaint in the second action alleged that the respondent was employed to defend not only for the appellants but for the Seattle Country Club as well. The first complaint tended, in a measure at least, to support the testimony of the appellant Marcellus Lara as to terms of the contract of employment; and, in view of the conflict in the evidence, should have been admitted. Of course the respondent was not bound or estopped by the allegations of his first complaint, but such complaint was material and competent for the consideration of the jury, and its rejection was error.

Among other things the court instructed the jury as follows: "A general warranty deed carries with it the covenant running with the land, and binds the covenantor or grantor, to defend the possession and estate in it; and it is the duty the covenantor owes to the grantee when his title, or estate, is assailed, to defend." The giving of this instruction is assigned as error. Whether the instruction is correct as an abstract proposition of law we need not inquire, for it was wholly inapplicable to the facts before the court and should not have been given. In the case of Johnson against the Laras and the Seattle Country Club, the Laras were in court defending their title, and their defense would of necessity inure to the benefit of their grantee. Under such circumstances the Laras were under no obligation to defend for the Country Club or to employ attorneys in its behalf. The jury might well infer from the instruction given that it was incumbent on the Laras to employ counsel for the Country Club, notwithstanding their own defense through their own attorneys, and the instruction was therefore misleading and erroneous. Other errors are assigned, but such as relate to

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matters that may arise on a new trial are not prejudicial and require no discussion.

The judgment is reversed and a new trial ordered.

FULLERTON, GOSE, CHADWICK, and MORRIS, JJ., concur.

[No. 8204. Department One. November 22, 1909.]

HARRY M. DUNKIN, *Respondent*, v. THE CITY OF HOQUIAM,
Appellant.¹

MUNICIPAL CORPORATIONS—DEFECT IN STREETS—COMPLAINT. In an action against a city for personal injuries sustained in running upon an obstruction in a street, the complaint need not state what officer was negligent.

DAMAGES—PLEADING—COMPLAINT. In an action for personal injuries, the complaint is sufficiently definite where it alleges that plaintiff's right knee was "skinned and bruised."

APPEAL—HARMLESS ERROR—MUNICIPAL CORPORATIONS—CLAIMS—LIMIT OF AMOUNT. In an action for personal injuries alleged in the complaint at \$26,230, after the filing of a claim against a city for only \$10,000, it is not prejudicial error to refuse to strike out all claims in excess of \$10,000, where the verdict was for the sum of \$7,500.

MUNICIPAL CORPORATIONS—STREETS—OBSTRUCTIONS—NEGLIGENCE—CONTRIBUTORY NEGLIGENCE. In an action by a bicyclist, against a city for personal injuries sustained by running against an obstruction in the street, the negligence of the city and the contributory negligence of the plaintiff is for the jury, where it appears that piles of soft mud, two feet high, from the construction of a sewer, were allowed to remain in a street for three days and were dangerous to all traveling in vehicles, that the night was dark and there were no lights or barriers, and the plaintiff, who was infirm, had no light on his bicycle.

DAMAGES—PERSONAL INJURIES—EXCESSIVE VERDICT. A verdict for \$7,500 for personal injuries is not excessive where it appears that the plaintiff, twenty-nine years of age, with a hand that had been broken and which was nearly normal, and who had been subjected to an operation closing the lower bowels and making an artificial anus in his side, under partial control, was able to do light work, and earned

¹Reported in 105 Pac. 149.

\$2.50 a day grinding knives in a planing mill, and by reason of a fall from his bicycle, the knuckles of his hand were rebroken, and the injury made permanent, his other trouble increased, the bowel protruding and getting beyond all control, causing great pain and suffering, and disabling him from performing work of any kind, and that the injury will increase as time progresses.

EVIDENCE—PERSONAL INJURIES—PHYSICAL EXHIBITIONS. A verdict for personal injuries will not be reversed for permitting the injured portions of the body to be exhibited to the jury on the ground that it enlisted their sympathy and was indecent.

DAMAGES—EVIDENCE—ADMISSIBILITY. In an action for permanent personal injuries, resulting in total disability, by one who was infirm, but who was earning \$2.50 a day before the accident, it is proper to exclude papers offered in evidence to show that the plaintiff was drawing a pension for total disability from injuries received in the service of the government, where the only identification of the papers was the statement of the witness that he received them in the mail, and believed them to be the original papers.

SAME—EVIDENCE—REMOTENESS. Such papers are inadmissible where they relate to a time eight years before the accident, as they are too remote.

SAME—HEARSAY. The certificate of a physician as to a total disability, made in a pension matter, is inadmissible to show the disability, as it is hearsay.

EVIDENCE—OPINIONS. Hypothetical questions based upon facts which the evidence tended to prove are admissible.

TRIAL—PHYSICAL EXAMINATION. It is not error to refuse to permit a physical examination of the plaintiff, during the trial of a personal injury case, where plaintiff was examined before the trial by physicians appointed by the court.

DAMAGES—EVIDENCE—MATERIALITY. In an action for personal injuries sustained by a person who was infirm from a previous disability, the cause of the previous difficulty and advice thereon is immaterial.

TRIAL—MISCONDUCT OF JUDGE. Comment by the court in giving reasons for ruling on objections to the evidence is not unlawful comment thereon in violation of the constitution.

NEGLIGENCE — CONTRIBUTORY NEGLIGENCE—INTOXICATION—INSTRUCTIONS. Upon an issue as to plaintiff's contributory negligence, it is not error to refuse to instruct the jury as to the effect of plaintiff's intoxication, where the only evidence on that subject was that of a witness who saw him "about half jagged" four or five hours before the accident, and who did not know whether he was drunk or not.

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Appeal from a judgment of the superior court for Chehalis county, Irwin, J., entered April 15, 1909, upon the verdict of a jury rendered in favor of the plaintiff, for personal injuries sustained by a bicyclist through an obstruction in a street. Affirmed.

James P. H. Callahan, E. E. Boner, and Sidney Moor Heath, for appellant.

W. H. Abel and Morgan & Brewer, for respondent.

GOSE, J.—This is a suit to recover damages for personal injuries. From a verdict and judgment against the city it has appealed.

The complaint states, that the appellant is a municipal corporation of the second class; that Second street is one of its principal streets and is planked for a width of twenty feet; that on September 24, 1908, at 9:30 o'clock in the evening, the street was obstructed by a ridge of soft mud, two feet in height and four to six feet in width, extending the full width of the street; that the city had notice of the obstruction, and that there were no lights or guards to indicate the danger or to protect against it; that at such time the respondent, whilst riding a bicycle at a slow rate of speed, ran into the obstruction and was thrown violently from his wheel onto the planking upon the street, sustaining great and permanent injuries. The complaint further states, that prior thereto the respondent had sustained an injury to his left hand, breaking certain bones, which had about united and recovered; that by reason of the fall the bones were re-broken; that prior to the accident the respondent contracted yellow fever; that as a result of the disease he had been subjected to an operation, whereby an opening had been made in his side from which a small portion of the intestine projected; that he was in good health except as to the protruding intestine which, from the violence of the fall, was torn from the abdominal wall, causing a further prolapse, and

causing great pain and suffering; that the respondent will never be able to work, and that his right knee was skinned and bruised. The presentation of a claim for \$10,000 was also alleged. Damages were demanded in the sum of \$26,230.

A motion was interposed to require the respondent to state what officer had been negligent, to state whether the injury to the knee was the cause of the pain and suffering, to require the complaint to be made more definite and certain in other respects, and to strike it as an entirety. The motion being denied, a demurrer was filed and overruled. The answer joined issue upon all the material matters set forth in the complaint except the presentation of the claim to the city for \$10,000, and alleged affirmatively, (1) that the accident was the result of the respondent's negligence; (2) that the claim sued upon was not presented to the city. The reply joined issue upon the new matter, and the case proceeded to trial and judgment.

There was no error in denying the appellant's motion to make the complaint more definite and certain. The respondent was not required to allege the particular officer whose neglect caused the injury. The negligence, if any, was that of the city. The allegation that the respondent received an injury to his right knee, that it was "skinned and bruised," was sufficiently definite.

The appellant is a city of the second class. Section 36, page 674, of the Laws of 1907, provides that all claims for damages against the city must be filed with the city clerk, and that no action shall be prosecuted against the city for any claim for damages until the same has been presented to the city council. It is admitted that the respondent, in due time, filed his claim with the city clerk for damages in the sum of \$10,000. The motion sought to strike from the complaint the averment of damages in excess of that sum. There was no error in denying the motion in this respect. The verdict was for \$7,500. It seems to be conceded that the error, if any, would have been cured had the court directed the

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jury that the recovery was limited to \$10,000. The question is purely an abstract one in view of the record. The ultimate fact to be determined by the jury was the amount of damages sustained by the respondent. The amount claimed would not change the nature of the testimony, nor influence the verdict.

A motion for nonsuit was interposed at the close of respondent's case, the denial of which is assigned as error. The evidence tended to show that, a few days before the accident, a property owner had obtained the permission of the street commissioner to dig a trench across the street at the place where the accident occurred, for the purpose of laying a sewer pipe; that the trench was dug; that there was a planked way used by the traveling public about twenty feet in width; that across the entire street there was loose dirt or mud taken from the trench, two feet or more in height and about four feet in width; that the street remained in this condition for about three days without a light or barrier; that about 9:30 in the evening the respondent was riding home on his bicycle, without a light, at reasonable speed; that the night was dark and the nearest city light was a half block distant from the obstruction; that the street was one of the leading streets of the city; that he was riding upon the planked way; that when his wheel came in contact with the obstruction he was thrown over the handle bars and onto the planking and sustained a serious injury. The evidence showed that the dirt had been there for about three days before the accident happened. The question of the contributory negligence of the respondent and whether the city in the exercise of reasonable care should have known of the obstruction were for the jury to determine. There was abundant evidence that the obstruction was of such character as to be dangerous to all traveling in vehicles. It is urged that the admitted physical infirmities of the respondent made it negligence on his part to ride a bicycle in the nighttime. Streets are not maintained solely for the young and

strong, and we cannot announce as a rule of law that he was guilty of such negligence as would preclude a recovery. Nor can we upon the facts declare the law to be that the riding of a bicycle without a lantern was an act of negligence.

It is next urged that a new trial should have been granted because the verdict is excessive. The evidence of the respondent tended to show that, in 1900, he contracted the yellow fever, which resulted in the closing of the lower bowels; that since that time he has had an artificial anus which he could partially control; that he is twenty-nine years of age; that before the injury he was able to do light work, and that he had been earning \$2.50 per day grinding knives in a planing mill until he received the injury to his hand, about five weeks preceding the injury complained of; that his hand was nearly normal at the time of the accident; that before the injury, the bowel projected from the side not to exceed an inch, and that he was free from pain; that when he got home, a short time after sustaining the injury, the artificial anus was bleeding; that it caused him constant pain and suffering; that he has no control over it; that he cannot perform any kind of labor; that the knuckles of the forefinger were rebroken; and that his injury is not only permanent, but that his condition is pitiable in the extreme. The testimony of Dr. Harrison shows that he examined the respondent in January, 1901; that the artificial anus was then in good condition, the projection of the bowel being about one-twelfth of an inch; that he next examined him about two years before the trial, his condition then being about the same as when he made the former examination, and that he was then in good health; that he examined him at the time of the trial and found that seven or eight inches of the lining of the bowel protruded from the side; that he had no control over the bowel; that he was not able to do any kind of work; that he was in constant pain, and that the injury will increase as time progresses. Upon this evidence it seems certain that the jury did not award excessive damages.

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The court permitted respondent to twice exhibit the injured part to the jury. This is urged as error upon two grounds, (1) that it had a tendency to enlist the sympathy of the jury, and (2) that it was indecent. Upon the first contention we assume that, had the injury complained of been a broken leg or arm, the contention would not be tenable. The fact that the injury occurred to some other part of the body would not change the rule of evidence. We apprehend that no court would permit the introduction of indecent evidence, unless it was so connected with the *res gestae* as to become necessary to the administration of justice. Indecency depends upon the purpose of the utterance or act.

“What we are to conclude, then, since the process of investigating the truth in courts of justice is both an indispensable and a dignified function of life, is that no utterances or acts called for in evidence in that process are to be prohibited because under other circumstances they might be characterized by indecency. In other words, the general policy of discountenancing indecency does not extend to the exclusion of evidence in a court of justice.” 3 Wigmore, Evidence, § 2180.

Upon the cross-examination of respondent, he was asked if he was not drawing a pension for total disability at the time of receiving the injury. The court sustained an objection to this question, which ruling is said to have been error. No authorities are cited in support of its relevancy. We do not understand that the appellant at the trial sought to prove that the respondent was suffering from a total disability before the accident, but rather that owing to his physical condition it was negligence for him to have ridden a bicycle in the dark without a lantern, and that his ailment was not increased by reason of the accident. The respondent, as we have stated, testified that up to a short time preceding the injury he was earning \$2.50 a day grinding knives in a mill. This the appellant not only did not attempt to disprove, but corroborated by the testimony of the foreman of the mill. The appellant offered in evidence certain papers purporting

to be the originals in the matter of a pension the respondent was receiving for infirmities resulting from his service in the United States army in the Philippine Islands. They were first offered in an unopened package. The court observed that they were offered as a mass; that not being advised as to what they contained, he would sustain the objection to their being admitted in evidence. Later one of appellant's counsel addressing the court said: "Of this mass . . . we offer the last three pages . . . being the medical examination and physician's certificate made in February, 1901, showing the condition of the man at that time." This case was tried in April of this year, more than eight years after the date of the report sought to be introduced in evidence. The offer was denied on the ground that the papers were not properly identified. The witness stated that he had received them by mail and believed them to be the original papers. We think there was no error in the ruling of the court. It is at least doubtful whether the papers were sufficiently identified. They were inadmissible on at least two other grounds, (1) they were too remote in point of time, and (2) the certificate of the medical examiner was hearsay. *Connecticut Mutual Life Ins. Co. v. Schwenk*, 94 U. S. 593, 24 L. Ed. 299.

Certain hypothetical questions were propounded upon which error is assigned. These were based upon facts which the evidence tended to prove, and as such were proper. *State v. Underwood*, 35 Wash. 558, 77 Pac. 863; *State v. Alcorn*, 7 Idaho 599, 64 Pac. 1014, 97 Am. St. 252.

Prior to the trial the court appointed certain physicians to examine the injuries sustained by the respondent, and they examined him. During the trial the appellant asked the court to require the respondent to submit to a further examination by one of these physicians. The court refused to do so, and the ruling is assigned as error. The authorities cited are cases where there had been no previous examination. There was no error in this ruling.

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The respondent was permitted to testify that Dr. Senn examined him and advised him that his bowel trouble was caused by yellow fever. The evidence shows that this was in 1900. This evidence was immaterial, but it does not follow that its admission was error. Counsel for appellant cross-examined at length as to how the operation in 1900 should have been performed. These matters were not a part of the case. The ultimate questions for the jury to determine were, (1) was the negligence of the city the proximate cause of the immediate injury, and (2) the damages sustained thereby by the respondent. Who advised or performed the operation in 1900, and whether it was done in the most approved way, were collateral to the main inquiry. A case will only be reversed for prejudicial error. *Hoseth v. Preston Mill Co.*, 55 Wash. 416, 104 Pac. 612.

The contention that the court commented on the facts is without merit. The court may, in ruling upon an objection interposed by counsel during the progress of the trial, or during the argument of counsel to the jury, assign a reason for a ruling without violating the provision of the constitution forbidding the court to comment on the facts.

It is urged that the court committed error in refusing to instruct the jury that in determining the question of the respondent's negligence it should take into consideration whether or not he was intoxicated. The evidence shows that the injury was sustained between nine and ten o'clock in the evening. The only evidence as to his intoxication is the testimony of one witness that he saw the respondent at five or six o'clock in the afternoon, the day of the accident; that he was then "about half jagged." He further said: "I do not know whether you would call it drunk or not." If the witness who saw the respondent did not know whether he was drunk or sober, the jury could not be given an instruction from which it might guess that he may have been drunk. The testimony that "he was about half jagged" is not only indefinite, but is too remote in point of time to require an in-

struction covering the respondent's state of sobriety. The law deals with reasonable probabilities. Instructions framed to cover vague and possible conditions arising from the evidence would tend to confuse and obscure the issues.

The other errors assigned by the appellant do not require separate consideration. We have examined the instructions given and those requested and refused, and we think, without specially setting out the instructions given, that they fully presented to the jury the general controlling principles of law governing the case. The jury were instructed that it was the duty of the city to keep its streets in a reasonably safe condition for travel; that if it had done so there was no liability; that a person traveling by night is required to use greater care than a traveler by day; that in determining the question of contributory negligence they should consider the condition of health and soundness of body of the respondent; that if the traveler has any physical infirmities he should exercise care commensurate with those infirmities; that it was for them to determine whether it was negligence for the respondent to have ridden his bicycle without a light on the night in question. The law as to whether the city had notice of the obstruction in the street was also fully covered by the instructions. The judgment will therefore be affirmed.

RUDKIN, C. J., CHADWICK, and FULLERTON, JJ., concur.

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[No. 8193. Department One. November 23, 1909.]

AUGUSTA HOOKWAY, *Guardian of Walter F. Heimann, a Minor, Respondent*, v. SADIE V. THOMPSON, *Appellant*.¹

HOMESTEADS—WHEN ATTACHES—MORTGAGE PRIOR TO DECLARATION—SEPARATE PROPERTY OF HUSBAND. The selection by a wife of a homestead from the husband's separate property does not defeat the lien of a prior mortgage thereon taken from the husband in good faith; since, under Bal. Code, § 5246, the homestead right attaches only "from and after the time the declaration is filed for record," regardless of occupancy.

Appeal from a judgment of the superior court for King county, Main, J., entered March 17, 1909, upon findings in favor of the plaintiff, in an action to foreclose a mortgage, after a trial on the merits before the court without a jury. Affirmed.

George W. Saulsberry (L. Y. Devries, of counsel), for appellant.

Aust & Terhune, for respondent.

GOSE, J.—This action was instituted by the respondent to foreclose a mortgage on lot 2, in block 4, of McGraw's Washington Park addition to the city of Seattle. The complaint contains the usual averments in the foreclosure of a real estate mortgage, and further alleges that, since July 20, 1907, James Thompson and the appellant, Sadie V. Thompson, have been husband and wife; that, at the time of the marriage, James Thompson was the owner of the mortgaged property; that on September 20, 1907, James Thompson borrowed from the respondent the sum of \$1,400, and for the purpose of securing its payment he, upon that date, executed and delivered to her a mortgage upon the property, describing himself as an unmarried man. The prayer is for

¹Reported in 105 Pac. 153.

a foreclosure of the mortgage, a sale of the mortgaged property, and an adjudication that the appellant wife has no interest in the property.

The appellant, Sadie V. Thompson, in her separate and amended answer, admits that she was married to her co-defendant on July 20, 1907; admits that he was the owner of the property at the time of the marriage; and alleges affirmatively that, immediately after the marriage, she and her co-defendant moved onto the premises and into the house situate thereon, and that she has since occupied the same as a homestead for herself and her husband; that she has no other home or homestead; that her husband is absent from the state at a place unknown to her; that he refused to claim the property as a homestead; and that on June 15, 1908, she executed and filed with the county auditor of the county where the property was situate a declaration of homestead on the property, for the joint use and benefit of herself and husband, and that she has expended her separate funds in improving the property. The action was commenced on March 4, 1908, and as we have stated, the declaration of homestead was executed and filed on June 15 following. A demurrer was interposed to the answer on the ground that it did not state facts sufficient to constitute a defense. From a judgment sustaining the demurrer, the appeal is prosecuted.

The single question presented for determination is whether a mortgage executed by a husband upon his separate real estate to secure a contemporaneous loan is valid and enforceable against a subsequent declaration of a homestead on the part of the wife. The question to this extent is a new one in this court, and its determination necessitates an examination of our homestead statutes. The applicable provisions are contained in Ballinger's Code, and are as follows:

"The homestead consists of the dwelling house, in which the claimant resides, and the land on which the same is sit-

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uated, selected as in this chapter provided." Bal. Code, § 5214 (P. C. § 5456).

"If the claimant be married the homestead may be selected from the . . . separate property of the husband." Bal. Code, § 5215 (P. C. § 5457).

"In order to select a homestead the husband or other head of a family, or in case the husband has not made such selection, the wife must execute and acknowledge, in the same manner as a grant of real property is acknowledged, a declaration of homestead, and file the same for record." Bal. Code, § 5243 (P. C. § 5485).

"From and after the time the declaration is filed for record the premises therein described constitute a homestead." Bal. Code, § 5246 (P. C. § 5488).

Under the prior law, Code of 1881, § 342, the homestead could be selected at any time before sale. In construing that statute, we held that no formal declaration was necessary in the selection of a homestead, but that its mere occupancy as such by the owner and his family constituted a selection. *Philbrick v. Andrews*, 8 Wash. 7, 35 Pac. 358; *Anderson v. Stadlmann*, 17 Wash. 433, 49 Pac. 1070. The appellant urges that we have adopted the same construction of the present statute, and cites in support of the contention, *Wiss v. Stewart*, 16 Wash. 376, 47 Pac. 736; *Anderson v. Stadlmann*, *supra*; *Ross v. Howard*, 25 Wash. 1, 64 Pac. 794; *Whitworth v. McKee*, 32 Wash. 83, 72 Pac. 1046; *Curry v. Wilson*, 45 Wash. 19, 87 Pac. 1065; *North Pacific Loan & Trust Co. v. Bennett*, 49 Wash. 34, 94 Pac. 664, and a case from this state, *In re Thompson*, 140 Fed. 257. In all these cases except the *Bennett* case, the homestead had been selected by occupancy under the law of 1881. While in some of the earlier cases cited the court remarked that the new law changed the old law as to the manner of selection but not as to the time of selection, the fact remains that the language was used in construing the old law. This is made clear and the position of the court as to the relation of the present statute to the prior one well stated by Chief Justice Fuller-

ton, in *Whitworth v. McKee*, *supra*, at page 99, in the following language:

“We agree with counsel that the later statute so far superseded the earlier one that no new homestead right can now be acquired under it, or could have been so acquired since the passage of the later statute. . . .”

He then pointed out that a homestead selected by occupancy under the old law was a vested interest, or an estate which could not be destroyed by the repeal of the law under which it was acquired. The same view is announced in *Donaldson v. Winningham*, 48 Wash. 374, 93 Pac. 534. It would seem that the meaning of the present law as to the time and manner of selection of a homestead, and as to when and how a homestead right is created, is so clear as to make it certain that a homestead can only be selected by the execution and filing of a homestead declaration, and that the premises constitute a homestead only from and after the time the declaration is filed for record. The words of the statute “from and after the declaration is filed,” mean that the homestead is brought into existence by the doing of the several statutory acts by the claimant, and that it exists and speaks from the date of the filing and not otherwise. The appellant acquired no homestead right by occupancy. There is nothing in the statute which remotely suggests that occupancy even initiates the right. A party executing a declaration of homestead must state, either that he is residing on the premises selected, or that he intends to reside thereon, and that he claims them as a homestead. It may be remarked that there is no provision in the law for the abandonment of the homestead by a discontinuance of possession, but that the statute expressly provides that a declaration of abandonment is effectual only from the time it is filed in the office in which this homestead was recorded.

One of the most valuable aids in the interpretation of a remedial statute is to consider the old law, the mischief, and the remedy, and it is the business of the courts so to construe

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the law as to suppress the mischief and advance the remedy. 1 Cooley's Blackstone, *page 88. The mischief of the old law was that a homestead right could be impressed upon real estate without the record giving any notice of its existence. The remedy intended by the statute was that such right could only be created by the filing of a declaration of homestead, and that it could only be abandoned by the filing of a declaration of abandonment. The evident purpose of the statute was that a homestead should exist in virtue of the record only. The spirit pervading the entire law negatives the view that upon the filing of a declaration of homestead it operates retroactively and defeats a preexisting right.

"The homestead right and the joint interests are created by the executing, acknowledging, and recording of the declaration. The new character of the estate, with its new incidents, commences at that moment and the new rights vest in both parties [meaning husband and wife] at the same time." *Barber v. Babel*, 36 Cal. 11.

In *Gleason v. Spray*, 81 Cal. 217, 22 Pac. 551, 15 Am. St. 47, in construing the words, "A declaration of abandonment is effective only from the time it is filed in the office in which the homestead is recorded," it was said:

"This last section, it is to be observed, fixes the time when the homestead character of the property is extinguished by abandonment, and does not give the abandonment any retroactive operation."

It was held in this case that a conveyance of the homestead after the filing of a declaration of abandonment took precedence over one executed while the property was a homestead. The court remarked that the words "from the time" must have been used advisedly. The provision of our statute, Bal. Code, §5246, and the section in relation to the abandonment of a homestead, are literal transcripts from the California statute construed in the *Gleason* case. If the words "*from the time*" speak only in the future, the stronger words declaring that the premises described in the declaration shall

constitute a homestead "*from and after the time*" it is filed, cannot be construed as having any retroactive force. This construction is supported by the following cases: *Titman v. Moore*, 43 Ill. 169; *Reimbach v. Walter*, 27 Ill. 393; *Smith v. Richards*, 2 Idaho 498, 21 Pac. 419; *Hines v. Duncan*, 79 Ala. 112, 58 Am. Rep. 580; *Bullene v. Hiatt*, 12 Kan. 98; *Hook v. Richeson*, 115 Ill. 431, 5 N. E. 98; *Davies-Henderson Lumber Co. v. Gottschalk*, 81 Cal. 641, 22 Pac. 860; *Tuttle v. Howe*, 14 Minn. 145, 100 Am. Dec. 205; *McCormick v. Wilcox*, 25 Ill. 274; *Symonds v. Lappin*, 82 Ill. 213.

The language in the *Bennett* case was used in construing Laws of 1899, page 94, §15, which provides that the occupant of a homestead shall remain in possession of it after the foreclosure of a mortgage and until the time for redemption has expired. To the extent that it conflicts with this opinion it is overruled. To the same extent *Waldron v. Kineth*, 41 Wash. 459, 84 Pac. 16, 111 Am. St. 1022, is also overruled, the controlling question there being the right of one having a homestead to object to confirmation of sale.

It follows from what we have said that the lien of a mortgagee in good faith cannot be defeated by the filing of a declaration of homestead subsequent to the execution and filing of a mortgage. The judgment will therefore be affirmed.

RUDKIN, C. J., FULLERTON, and CHADWICK, JJ., concur.

MORRIS, J., took no part.

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[No. 8091. Department One. November 23, 1909.]

JAMES E. DOUGLAS *et al.*, Respondents, v. WILLIAM F.
HANBURY *et al.*, Appellants.¹

VENDOR AND PURCHASER—CONTRACT—FORFEITURE—DEFAULT IN PAYMENT—WAIVER. Where seventeen monthly installments on a land contract were paid and accepted from a few days to a few months after maturity, the vendors waive a provision making time of the essence of the contract, and a forfeiture could not thereafter be declared without demand for payment or specific notice.

SAME—NOTICE OF FORFEITURE—SUFFICIENCY. After waiver of a provision making time of the essence of a contract to convey land, testimony by the vendor that he mailed a letter notifying the vendee of an installment falling due, and that he must be ready with the money, is not sufficient to show notice of a specific intent to declare a forfeiture, receipt of the letter being denied.

Appeal from a judgment of the superior court for King county, Main, J., entered April 13, 1909, upon findings in favor of the plaintiffs, in an action to quiet title, after a trial before the court without a jury. Reversed.

Averill Beavers and *Charles H. Gray* (Geo. McKay, of counsel), for appellants.

Revelle, Revell & Revell, for respondents.

RUDKIN, C. J.—On the 5th day of May, 1906, the plaintiff James E. Douglas, on behalf of himself and wife, entered into a contract with the defendant William E. Krause for the sale of the real property now in controversy, for the consideration of \$760, to be paid as follows: \$60 on execution of the contract, and \$10 on or before the 5th day of each and every month thereafter, until the full payment of the purchase price, with interest on the deferred payments at the rate of eight per cent per annum. The contract contained this further provision:

“Time is the essence of the contract, and in case of failure of the said party of the second part to make either of the pay-

¹Reported in 104 Pac. 1110.

ments or perform any of the covenants on his part, this contract shall be forfeited and determined at the election of the said party of the first part; and the said party of the second part shall forfeit all payments made by him on this contract, and such payments shall be retained by the said party of the first part in full satisfaction and liquidation of all damages by him sustained; and he shall have the right to re-enter and take possession of said land and premises and every part thereof."

On the 8th day of September, 1906, the defendant Krause assigned the contract to the defendant Hanbury. Payments were made on the purchase price under the contract as follows: May 5, 1906, \$60; installments for June, July, August, and September, 1906, with accrued interest, paid September 6, 1906; installments for October, November, and December, 1906, with accrued interest, paid December 15th, 1906; installments for January, February, and March, 1907, with accrued interest, paid March 20, 1907; installments for April, May, June, and July, 1907, with accrued interest, paid June 27th, 1907; installment for August, 1907, with accrued interest, paid August 25, 1907; installments for September, October, November, and December, 1907, with accrued interest, paid November 30, 1907. Up to this point there is no conflict in the testimony.

The defendant Hanbury testified that he tendered the installments for January and February, 1908, with accrued interest, to the plaintiff James E. Douglas on the 5th day of February, 1908, and that the tender was refused. His testimony was fully corroborated by another witness, but the fact of tender was denied by the plaintiff James E. Douglas. The plaintiffs, on the other hand, testified that they notified the defendant Hanbury by letter on the 26th day of December, 1907, that the January payment would fall due on January 5, next, and that he must be ready with the money. Hanbury denied the receipt of any such letter. The present action was instituted by the vendors to quiet their title as

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against the contract of sale, and from a judgment in their favor, the present appeal is prosecuted.

The rule is firmly established in this state that, where time is made of the essence of a contract of sale, the vendor may declare a forfeiture of the contract for nonpayment of the purchase price or any installment thereof. *Drown v. Ingels*, 3 Wash. 424, 28 Pac. 759; *Wilson v. Morrell*, 5 Wash. 654, 32 Pac. 733; *Pease v. Baxter*, 12 Wash. 567, 41 Pac. 899; *Jennings v. Dexter Horton & Co.*, 43 Wash. 301, 86 Pac. 576. But the rule is equally well established that the right of forfeiture must be clearly and unequivocally proved, and that the right may be waived by extending the time for payment, or by indulgences granted to the purchaser. *Whiting v. Doughton*, 31 Wash. 327, 71 Pac. 1026; *Morgan v. Northwestern Nat. Life Ins. Co.*, 42 Wash. 10, 84 Pac. 412; *Insurance Co. v. Wolff*, 95 U. S. 326, 24 L. Ed. 387; *Insurance Co. v. Eggleston*, 96 U. S. 572, 24 L. Ed. 841; *Orr v. Zimmerman*, 63 Mo. 72; *Harris v. Troup*, 8 Paige 422; *Estell v. Cole*, 62 Tex. 695; *Stewart v. Gates*, 30 Miss. 100; *Watson v. White*, 152 Ill. 364, 38 N. E. 902; *Monson v. Bragdon*, 159 Ill. 61, 42 N. E. 383.

In *Watson v. White*, *supra*, the court said:

"He knew that all along, from the beginning, the clause declaring time to be of the essence of the contract, and other like clauses, had, by tacit agreement, remained in abeyance, and that all claims under them had been continuously waived. It may be that the rights of Fix under said clauses of the contract were not absolutely and permanently waived, but from the standpoint of a court of equity they were at least temporarily suspended, and capable of being reinstated only by giving a definite and specific notice of an intention to act under them. Good faith and square dealing required that much."

Of the nineteen monthly installments paid by the appellants, two were paid and accepted before maturity, and the remaining seventeen were paid and accepted from a few

days to a few months after maturity. Such a course of conduct constituted a clear waiver of the provision making time of the essence of the contract, and the vendors could not thereafter declare a forfeiture "until after demand for payment and the lapse of a reasonable time," as held by this court in *Whiting v. Doughton, supra*, or, by giving definite and specific notice of their intention to claim a forfeiture, as held in *Watson v. White, supra*. Common honesty and fair dealing required this much at their hands. The repeated indulgences granted to the purchaser clearly distinguish this case from *Garvey v. Barkley, ante* p. 24, 104 Pac. 1108.

The court below found all the facts in accordance with the claims of the respondents, based on the testimony of the respondent James E. Douglas, though this witness seems to have been contradicted by every witness he came in contact with at the trial. Two witnesses testified that a tender was made to him on February 5, 1908, but this he denied. Two other witnesses testified that he was notified of the assignment from Krause to Hanbury, but this he denied. He testified that he mailed a certain letter, but the receipt of the letter was denied. He testified that he demanded payment of the January, 1907, installment from the defendant Krause, but this, too, was denied. However, giving full force and effect to the respondents' testimony and to the findings of the court, a forfeiture should not have been decreed under the circumstances disclosed by the record in this case. The judgment is therefore reversed, with directions to dismiss the action.

FULLERTON, CHADWICK, GOSE, and MORRIS, JJ., concur.

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Opinion Per Curiam.

[No. 8302. Department Two. November 24, 1909.]

W. F. HAYS, *Appellant*, v. TERRENCE O'BRIEN, *as*
Administrator of the Estate of John Sullivan,
Deceased, and MARIE CARRAU *et al.*,
Respondents.¹

APPEAL—DECISIONS REVIEWABLE—ORDER REFUSING TO VACATE A JUDGMENT. An appeal from an order dismissing a case as to part of the defendants, or from an order refusing to vacate such judgment, will be dismissed where all the errors alleged could have been reviewed on appeal from the final judgment; as the case cannot be heard piecemeal.

Appeal from an order of the superior court for King county, Yahey, J., entered March 16, 1909, refusing to vacate a judgment, after a hearing before the court. Appeal dismissed.

Henry St. Rayner and *W. F. Hays*, for appellant.

E. M. Carr and *Corwin S. Shank*, for respondents.

PER CURIAM.—It is quite difficult to determine from a reading of this record what the object of the action was, or how the plaintiff could expect to derive any benefits from it under any known system of judicial proceedings. It is not necessary to again give the history of this case, as it has been more than once before this court. But it was probably the intention to wipe out all prior judgments of this court and of the superior courts on the subject of the alleged nuncupative will of John Sullivan, deceased, and establish plaintiff's interest in the property of the Sullivan estate under a contract for attorney's fees with Marie Carrau, the beneficiary of said will and one of the defendants in this action. This action was brought by plaintiff against Terrence O'Brien, as administrator of the estate of John Sullivan, deceased, and Marie Carrau and others. Carrau and O'Brien had demurred to the complaint, and after about a year from the interposition of

¹Reported in 105 Pac. 162.

the demurrers, the same not having been disposed of, the appellant obtained leave to file a supplemental complaint. The appellant objected to going to trial until after the disposal of the demurrers before mentioned, and alleges error of the court, in overruling his objection to do so; in going to trial without requiring O'Brien to answer the supplemental complaint; in dismissing plaintiff's case in pursuance of the motion of defendants Piles, Donworth, Howe & Farrell, as to defendants Terrence O'Brien and Marie Carrau; in overruling plaintiff's motion to set aside the order of the court made on March 9, 1909, whereby the court overruled plaintiff's objection and motion against proceeding to trial under the circumstances; and in overruling plaintiff's motion on March 11, to set aside the order made on March 9, just referred to. Some other errors are alleged in regard to the statement of facts, but they are not material. Upon the court refusing to sustain objections to proceeding to trial, the plaintiff and his attorney left the court room, announcing that that was the end of it, and they did not appear again in the action. The respondents proceeded to put in their proof, and final judgment was rendered. From this final judgment, no appeal has been taken, but on May 5, 1909, a motion to vacate the judgment and decree was filed, which motion was heard and denied on May 19, 1909. No motion for a new trial has ever been made.

If this could be construed to be an appeal from a motion to vacate the judgment, it was decided by this court in *Nelson v. Denny*, 26 Wash. 327, 67 Pac. 78, that an order vacating a judgment is not appealable under any of the provisions of Bal. Code, § 6500 (P. C. § 1048), authorizing the right of appeal. All the other alleged errors of the court could have been reviewed on an appeal from the final judgment in the cause; and that being true, the appeal in this case will not lie, for the reason stated many times by this court, that a case cannot be brought here on appeal piecemeal.

The motion to dismiss will therefore be granted.

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Opinion Per Curiam.

[No. 8207. Department One. November 24, 1909.]

HENRY SHERMAN, *Respondent*, v. EASTERN & WESTERN
LUMBER COMPANY, *Appellant*.¹

APPEAL—DECISIONS REVIEWABLE—AMOUNT IN CONTROVERSY. An appeal in an action to recover \$30 damages, as the value of a steer killed on an unfenced logging railroad, raising the question whether the defendant was a railroad, within the act of 1903, does not involve the "validity of a statute," within Const., art. 4, § 4, limiting the jurisdiction of the supreme court to money demands exceeding \$200.

Appeal from a judgment of the superior court for Cowlitz county, McCredie, J., entered April 22, 1909, upon an agreed statement of facts, in an action in tort. Appeal dismissed.

S. B. Linthicum, H. E. McKenney, and Percy P. Brush, for appellant.

B. L. Hubbell, for respondent.

PER CURIAM.—Respondent recovered judgment against appellant in the sum of \$30, the stipulated value of a steer and a heifer, killed by one of appellant's trains on its logging road in Cowlitz county. The theory of the appellant is that it is not a railroad, within the meaning of the act of 1903, requiring railroad companies to fence along the right of way, and attempts to raise that question on its appeal to this court.

The constitution, art. 4, § 4, excepts appellate jurisdiction in this court in all civil actions for the recovery of money only, when the original amount in controversy does not exceed the sum of \$200, "unless the action involves the legality of a tax, impost, assessment, toll, municipal fine, or the validity of a statute." The judgment demanded in the complaint was \$30. The case falls clearly within the constitutional ex-

¹Reported in 105 Pac. 166.

ception, and not being within any of the provisos, this court is without jurisdiction to hear the appeal, and the same is dismissed.

[No. 8209. Department Two. November 24, 1909.]

MARCELLUS LARA, *Respondent*, v. JOHN E. PETERSON *et al.*,
Appellants.¹

TAXATION—DECREE AND DEED—DEFINITENESS—DESCRIPTION—LIBERAL CONSTRUCTION. A description in a tax foreclosure and deed of a lot "less west two feet," where the boundary lines varied about twelve degrees from due north and south, is a sufficiently definite description of the lot, less two feet cut off by a north and south line, measured from the most westerly point of the lot, under a liberal construction of the provision of Laws 1899, p. 301, requiring the sale of land for taxes to be made by selling a portion off the east side of the tract, determined by "a line drawn due north and south far enough west of the eastern point of the tract to make the requisite quantity."

Appeal from a judgment of the superior court for King county, Griffin, J., entered January 8, 1909, upon findings in favor of the plaintiff, in an action of ejectment, after a trial before the court without a jury. Reversed.

Wright & Kelleher and *Chas. P. Harris*, for appellants.
John G. Barnes, for respondent.

DUNBAR, J.—This is an action in ejectment, to secure possession of lots 1 to 5, inclusive, and 7 to 28, inclusive, all in block 7, of Maple Grove Park Subdivision of East Seattle, King county, Washington. The complaint alleges that the plaintiff is the owner of said land, describing it; that the defendants are in possession and claiming title by virtue of three certain deeds of conveyance made to the defendant John E. Peterson, by the county treasurer of King county, state of Washington, purporting to have been executed on

¹Reported in 105 Pac. 160.

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account of sales in tax foreclosure proceedings, which deeds, it is alleged, are wholly void as far as the above described property is concerned, and that they constitute a cloud upon plaintiff's title; alleges payment of taxes, demands, etc.; and prays judgment that plaintiff is the owner in fee simple of the land described and entitled to the immediate possession thereof, that the deeds be declared null and void, that plaintiff be permitted to redeem from said tax sale by paying to defendants all taxes, penalties, interest, and costs, etc., and that his title to said lands be declared free and clear of any claims of the defendants or either of them, and for general relief.

To this complaint the defendants interposed a general demurrer, which was overruled. Answering, the defendants denied ownership in the plaintiff, and that the possession of defendants was wrongful, and alleged that on the 16th day of October, 1903, in a certain cause pending, judgment was duly and regularly rendered foreclosing certain tax liens on the property described in the complaint, and ordering the sale thereof; that, pursuant to an order of sale duly and regularly issued by said court pursuant to said judgment, the lots in question were sold to the defendants; that the defendants complied with the laws of the state of Washington necessary to entitle them to a deed for said real estate, and that on the 23d day of November, the treasurer of King county duly and regularly issued to defendant John E. Peterson three tax deeds, conveying all of the last described property to the said defendant; alleging the validity of the deeds, and alleging other defenses which from the view we take of the main question in the case, viz., as to the sufficiency of the description, it is not necessary to set forth or discuss in this opinion. Upon trial the court found that the description in the deed was insufficient to convey right or title to the defendant, and judgment was rendered in favor of the plaintiff as prayed for. So that the material question to be decided here is, was the description in the deeds

from the county treasurer to the defendant sufficient to convey title.

The description was as follows: "Lot 1, less the west two feet, and lot 2, less west two feet," and so on for each of the twenty-eight lots comprising block 7, Maple Grove Park Subdivision of East Seattle, excepting lot 6, in which case the bid was for the whole lot, the number of feet varying from less the west one foot in the case of lot 3, to less the west sixty-one feet in the case of lot 28. The deeds from the treasurer described the property sold and conveyed in the same language as that in which the bids were made. The lower court decided that, on account of the fact that the boundary lines of the lots varied from due north and south, the deeds were void for indefiniteness of description, the variation being about twelve degrees.

It is said by the supreme court of the United States in the case of *Turpin v. Lemon*, 187 U. S. 51, 23 Sup. Ct. 20, 47 L. Ed. 70. "Laws for the collection and assessment of general taxes stand upon a somewhat different footing and are construed with the utmost liberality;" and this court in passing upon this question in *Mills v. Thurston County*, 16 Wash. 378, 47 Pac. 759, said:

"But it is evident that, if the statute is to receive such a literal construction, it would serve little or no purpose. While there is some conflict in the authorities as to whether revenue statutes should be given a liberal or strict construction, it seems to us that the better rule is that they should receive a fair construction . . ."

In *Spokane Terminal Co. v. Stanford*, 44 Wash. 45, 87 Pac. 37, this court said: ". . . and we see no reason now for departing from the rule thus stated. A fair construction should be given to any law, whether it be a law in relation to the collection of taxes or not." It was also said by this court in *Ontario Land Co. v. Yordy*, 44 Wash. 239, 87 Pac. 257, that a description in a deed or other instrument affecting title to real estate is sufficient if it affords an intelligent

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means for identifying the property, and does not mislead. Without further citation of authorities, which almost universally are along the same line of thought—and especially modern authorities—we think the description in these deeds was sufficient, and that it plainly appears that the intention was to deed to the defendant lot 1 less two feet along the west side of the lot, and so with the other lots described, and that there would have been no difficulty in the purchaser or any one else determining the land sold and the land reserved from the sale in that lot.

This is conceded by the respondent, but he is asking for a strict construction of the statute, and claims that, under the literal terms of the statute, the deeds are indefinite. That portion of the statute relating to revenue and taxation in force and applicable to the case at bar is as follows:

“The person at such sale offering to pay the amount due on each tract or lot for the least quantity thereof shall be the purchaser of such quantity which shall be taken from the east side of such tract or lot, and the remainder thereof shall be discharged from the lien. In determining such piece or parcel of such tract or lot, a line is to be drawn due north and south, far enough west of the eastern point of tract to make the requisite quantity.” Laws 1899, p. 301.

It is claimed here that, if the line were drawn due north where the variation is twelve degrees, it would not describe the property intended to be sold, and that consequently the deeds are void for want of definiteness of description. The strict letter of the law lends support to this contention, but regard for the letter of the law to the exclusion of its spirit has not been dominant from the days of the Divine Lawgiver down to the present time; and this law, taken as a whole, when construed with reference to its plain intent, will not bear the strict construction placed upon it by the respondent. The office of a description is not to identify the land, but to furnish the means of identification, and a deed will not be declared void if the land can with any reasonable degree of

certainty be identified from the description aided by extrinsic evidence. As suggested by the attorney for appellants, it can make no difference whether the description reads for a certain number of feet on the eastern part of the lot or for the entire lot less a certain number of feet on the west side. The point of beginning for measuring the amount sold or the amount excepted is from the most easterly or most westerly point, and when such distance is measured off, the boundary line is run due north and south. In this manner the exact amount of land either sold or reserved can be determined.

The judgment will be reversed with instructions to enter judgment for defendants.

RUDKIN, C. J., CROW, MOUNT, and PARKER, JJ., concur.

[No. 8334. Department Two. November 24, 1909.]

E. B. PALMER *et al.*, *Respondents*, v. A. PETERSON,
Appellant.¹

JURY—RIGHT TO JURY TRIAL. An action to restrain a trespass is of equitable cognizance and without right to a jury trial.

EVIDENCE—DOCUMENTARY EVIDENCE—STATE DEED. A state deed is admissible in evidence without proof of compliance with the statute pursuant to which it was issued.

PUBLIC LANDS—OYSTER LANDS—STATE CONVEYANCE—RIGHT TO POSSESSION—INJUNCTION. A state deed of oyster lands, covered and uncovered by the flow of the tide, grants the exclusive right to possession, and the owner may maintain an action to restrain any person from entering upon or passing over the same, either upon foot or by boat.

NAVIGABLE WATERS—COMMERCE—POSSESSION OF TIDE LANDS UNDER STATE DEED. A state deed of oyster lands, granting exclusive possession and preventing strangers from passing over the same by boat, is not a substantial impairment of the interests of the public in navigable waters or an interference with the Federal right to regulate commerce.

¹Reported in 105 Pac. 179.

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Opinion Per RUDKIN, C. J.

Appeal from a judgment of the superior court for Kitsap county, Yakey, J., entered March 22, 1909, upon findings in favor of the plaintiff, after a trial before the court without a jury, in an action to restrain a trespass. Affirmed.

Revelle, Revelle & Revelle, for appellant.

E. B. Palmer, for respondents.

RUDKIN, C. J.—The plaintiffs are the owners of certain tide lands of the second class, in Kitsap county, which form an arm of Puget Sound and are covered and uncovered by the flow and ebb of the tide. The lands are suitable for the cultivation of oysters, and were conveyed by the state to the predecessor in interest of the plaintiffs, under the provisions of the acts relating to the purchase and sale of oyster lands, Laws 1895, pp. 36-39. The state deed is absolute in form, aside from a provision for a reversion in case the lands are abandoned or used for any purpose other than the cultivation of oysters.

The present action was instituted to restrain the defendant, his agents, servants, and employees from entering upon or passing over the tide lands in question, either upon foot or by boat, or other water craft, and for damages. From a judgment in favor of the plaintiffs according to the prayer of their complaint, this appeal is prosecuted.

The first error assigned is the denial of a trial by jury. The action was of equitable cognizance and was properly triable by the court. Bal. Code, §§ 4966, 4967 (P. C. §§ 358, 359); *Sequim Bay Canning Co. v. Bugge*, 49 Wash. 127, 94 Pac. 922.

The admission of the state deed in evidence without proof of compliance with the provisions of the statute pursuant to which the deed was given is next assigned as error. There was no error in this ruling. *Welsh v. Callvert*, 34 Wash. 250, 75 Pac. 871, and cases cited.

It is lastly contended that inasmuch as the tide lands in

controversy are covered by water to a depth of seven or eight feet at high tide, such waters are navigable, and the appellant has a lawful right to pass over the same, notwithstanding the title of the respondents. This contention cannot be sustained. The state deed is absolute in form, and carries with it the right to the exclusive possession and enjoyment of the lands granted, if such a grant was within the competency of the state, and that such a grant was within the competency of the state cannot, at this late day, be controverted. The nature of the state's title to tide lands has so often been considered by this court, and by the supreme court of the United States, that the question should be considered at rest. In *Illinois Cent. R. Co. v. Illinois*, 146 U. S. 387, 435, 13 Sup. Ct. 110, 36 L. Ed. 1018, the court said:

“It is the settled law of this country that the ownership of and dominion and sovereignty over lands covered by tide waters, within the limits of the several states, belong to the respective states within which they are found, with the consequent right to use or dispose of any portion thereof, when that can be done without substantial impairment of the interest of the public in the waters, and subject always to the paramount right of Congress to control their navigation so far as may be necessary for the regulation of commerce with foreign nations and among the states. This doctrine has been often announced by this court, and is not questioned by counsel of any of the parties.”

See, also, *Eisenbach v. Hatfield*, 2 Wash. 236, 26 Pac. 539, 12 L. R. A. 632; *Lonsdale v. Grays Harbor Boom Co.*, 54 Wash. 542, 103 Pac. 833; 1 Farnham, Waters and Water Rights, §43.

The conveyance by the state of tide lands covered and uncovered by the flow and ebb of the tide is not a substantial impairment of the interest of the public in the navigable waters of the state, and does not interfere with the paramount right of Congress to regulate commerce with foreign nations and among the several states. *Willson v. Black*

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Bird Creek Marsh Co., 2 Pet. 245, 7 L. Ed. 412; *Bolsa Land Co. v. Burdick*, 151 Cal. 254, 90 Pac. 532.

Judgment affirmed.

CROW, MOUNT, PARKER, and DUNBAR, JJ., concur.

[No. 8190. Department Two. November 24, 1909.]

L. A. GASAWAY, *Respondent*, v. H. J. THOMAS, *Appellant*.¹

FIXTURES—DEFINITION. Whether an article, once a chattel, has become a fixture, depends (1) upon actual annexation to the realty, (2) application to the use to which that part of the realty is appropriated, and (3) the intention of the parties to make permanent accession to the freehold.

FIXTURES—WHAT LAW GOVERNS. Upon a question as to fixtures on land in British Columbia, the law of that province governs.

EVIDENCE—LAWS OF ANOTHER COUNTRY—EXPERT EVIDENCE—FIXTURES. The opinion of a barrister in British Columbia that certain machinery on mining property was a fixture in that province, is not controlling where he did not testify to any statute or judicial decision, especially where he erroneously assumed that the machinery was used in working a mine, and where, from decisions cited, it should be presumed that the general rule there was the same as our own.

FIXTURES—MINING MACHINERY—INSTALLED BY PURCHASER FOR PROSPECTING. Mining machinery installed by a purchaser under a contract whereby he was to pay annual installments, and to take possession and prosecute a certain amount of development work, remains personal property which he can remove on forfeiting the contract before surrendering possession, where it appears from the purchaser's testimony that the machinery, a hoisting engine and boiler, were installed for the sole purpose of prospecting the claims and to determine their value, and were not suitable for working the mines.

Appeal from a judgment of the superior court for King county, Frater, J., entered February 6, 1909, upon findings in favor of the plaintiff, in an action in tort, after a trial before the court without a jury. Affirmed.

William Parmerlee, for appellant.

S. G. Murray, for respondent.

¹Reported in 105 Pac. 168.

RUDKIN, C. J.—This was an action to recover damages for the conversion of a hoisting engine, air compressor, steam boiler, and other appliances used in the development of certain mining claims. The material facts are as follows: On the 4th day of November, 1905, the defendant Thomas, and other persons associated with him, entered into a contract with one Carter for the sale of certain mining claims, in the Sayward Mining District, in the Province of British Columbia, Dominion of Canada, for which the purchaser agreed to pay the sum of \$10,000 in the manner following: \$500 on or before six months, \$500 on or before one year, \$1,000 on or before two years, and \$8,000 on or before three years. It was further agreed that the purchaser should take possession and commence development work on the claims within forty days after the signing of the contract, and should expend at least \$1,000 in development work each year during the continuance of the contract, after the first six months; that the purchaser should be entitled to all profits arising from the working of the mines, and that upon his request and the payment of the cost thereof the vendors should obtain a crown patent for the claims. The contract further stipulated that, if the purchaser failed to perform or comply with any of its conditions, all his rights and interest in the claims should be forfeited and at an end.

Carter assigned the contract and all rights thereunder to the plaintiff soon after its execution. The plaintiff took possession of the claims under the contract and performed development work for about two years. During the first year, he sunk a shaft to the depth of 60 feet, performing all the labor by hand. The machinery in controversy was then installed, and during the second year the shaft was sunk about 30 feet deeper. The \$1,000 payment falling due on November 4, 1907, was never made, the plaintiff forfeited all rights under his contract, and abandoned the claims. About a week after November 4, 1907, the plaintiff stored

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the machinery in controversy on the claims, and thereafter the defendant seized the same and converted it to his own use. The testimony tends to show that the hoisting engine and air compressor were attached to a log about fifteen feet in length, hewed flat on both sides, and that the boiler was set on a stone foundation. A temporary shed, built of shakes on a pole framework, was constructed over the machinery to protect it from the elements. The plaintiff testified that the machinery was installed for the purpose of prospecting the claims, that it was not fit or suitable for any other purpose, and that it was so installed for the sole purpose of prospecting the claims far enough to enable him to determine whether he would be justified in making further payments or expenditures under his contract. On this state of facts, the court found that the machinery at all times remained personal property and gave judgment for its value. From this judgment the defendant has appealed, and the only question presented for our consideration is, Was the machinery a chattel or a fixture?

A fixture is generally defined as an article which was once a chattel, but by physical annexation to the realty has become accessory to and part and parcel thereof. In *Filley v. Christopher*, 39 Wash. 22, 80 Pac. 834, 109 Am. St. 853, it is said:

“The true criterion of a fixture is the united application of these requisites: (1) Actual annexation to the realty or something appurtenant thereto; (2) application to the use or purpose to which that part of the realty with which it is connected is appropriated; and (3) the intention of the parties making the annexation to make permanent accession to the freehold.”

But when we come to apply this definition and this criterion to the multifarious facts that arise in the complex affairs of a busy world we are confronted with a difficult task. As well said by the court in *Atchison etc. R. Co. v.*

Morgan, 42 Kan. 23, 21 Pac. 809, 16 Am. St. 471, 4 L. R. A. 284:

“It is frequently a difficult and vexatious question to ascertain the dividing line between real and personal property, and to decide upon which side of the line certain property belongs. When we compare a thing at the extremity of one class with a thing at the extremity of the other, the difference is obvious; but when we approach the question of fixtures which is the dividing line between real and personal property there is often great difficulty. The decisions of the courts are apparently as diverse as the peculiarities of the facts in the different cases that are decided; and being largely governed by the particular facts of each case, the citation and examination of decisions often tend to confuse rather than to enlighten the judgment.”

The property in controversy had its situs in the Province of British Columbia, and the question before us must be decided with reference to the law of that Province if any competent proof of such law is found in the record. For the purpose of proving the law of British Columbia on the subject of fixtures the appellant offered the deposition of a barrister practicing at Vancouver in that Province. An examination of this deposition and the authorities therein cited convinces us that the law of British Columbia on the subject of fixtures is as unsettled and uncertain as our own. It appears from the testimony of this witness that the question at issue is not controlled by any statute of British Columbia, and that the point has never been directly decided by the courts of that Province; that the courts of British Columbia are bound by the decisions of the supreme court of Canada, and of the judicial committee of the privy council of England; that they are not bound by the decisions of the other English and Canadian courts, but that such decisions are viewed substantially as we view the decisions of the courts of our sister states. The witness expressed the opinion, however, that the machinery in controversy was a fixture, and in support of his conclusion cited the following Canadian

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and English cases: *Haggert v. Town of Brampton*, 28 Canada Sup. Ct. 174; *Rogers v. Ontario Bank*, 21 Ont. 416; *Gasco v. Marshall*, 7 Q. B. U. C. 193; *Cleaver v. Culloden*, 14 Q. B. U. C. 491; *Wake v. Hall*, 8 App. Cas. 195; *Cross v. Barnes*, 36 L. T. N. S. 693; *Monti v. Barnes*, 1 K. B. (1901) 205; *Reynolds v. Ashby & Son*, 1 K. B. (1903) 87; *Hobson v. Gorringe*, 1 Ch. Div. (1897) 182.

One of these decisions is from the supreme court of Canada, and one from the judicial committee of the privy council of England. In the former (*Haggert v. Town of Brampton*) it was held that machinery in a manufacturing establishment passed by a mortgage of the freehold, but to show that the law of Canada is practically the same as our own we quote the following, which is quoted with approval in that case:

“There is no doubt that the general maxim of the law is, that what is annexed to the land becomes part of the land, but it is very difficult, if not impossible, to say with precision what constitutes an annexation sufficient for this purpose. It is a question which must depend on the circumstances of each case, and mainly on two circumstances as indicating the intention, viz., the degree of annexation and the object of annexation.”

In the second case (*Wake v. Hall*) it was held that certain buildings erected on mining claims remained personal property—a conclusion that does not aid the appellant. An extended review of the other cases would not be profitable, as they do not differ from a like number of cases that might be selected from any other jurisdiction, and are as little in point. In *Gasco v. Marshall*, and *Cleaver v. Culloden*, it was held that certain buildings were a part of the land. In *Rogers v. Ontario Bank* it was held that certain machinery used in working a mine passed by a mortgage of the mine. In *Monti v. Barnes* it was held that certain “dog grates” passed by a mortgage of the freehold. In *Reynolds v. Ashby* it was held that certain machinery in a factory

passed by a mortgage of the factory. In *Hobson v. Gorringe*, it was held that a gas engine used to propel a saw-mill passed by a mortgage of the mill. In *Cross v. Barnes*, it was held that portable engines, usually used without being attached or affixed to the land, and only fixed for the purpose of steadying them while in use, and only intended to be used for the temporary purpose of sinking a pit, were fixtures as between mortgagor and mortgagee. It must be conceded that the case last cited is a strong one in favor of appellant, but it was decided by a single judge, and the decision seems to ignore one of the main characteristics of a fixture; namely, that it was intended as a permanent accession to the freehold. If this decision is sound, machinery used in drilling for water, coal, oil, or any purpose, however temporary or transitory, would become a fixture.

The witness called to prove the foreign law did not testify to any statute or judicial decision, but merely expressed an opinion upon a question of general law, where the authorities are conflicting, and where each case is governed by its own peculiar circumstances. Furthermore, the opinion is based upon a state of facts which does not appear in the record, for the witness assumed that the machinery was used in working the mine and not for prospecting purposes only. For these reasons we are constrained to presume that the laws of British Columbia are the same as our own, and to decide the case accordingly. Treating the question as one of general or local law, we approve of the reasoning and conclusion of the supreme court of Oregon in *Alberson v. Elk Creek Min. Co.*, 39 Ore. 552, 65 Pac. 978, where property of a similar nature and installed for a similar purpose was held to be personal property.

The only difference in the two cases lies in the fact that in the Oregon case the purchaser had only an option, while here there was a contract of sale. But inasmuch as the purpose and intent of the party making the annexation is controlling, this difference would not seem to be material. The point is

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made that the machinery was removed after the time for making the payment of November 4, 1907, had expired, but we apprehend that if the right of removal existed at all it might be exercised at any time before possession of the claims was surrendered, if, indeed, it might not be removed at any time thereafter. Believing that the question at issue was correctly decided by the court below, its judgment is affirmed.

MOUNT, PARKER, DUNBAR, and CROW, JJ., concur.

[No. 8052. Department Two. November 24, 1909.]

THE STATE OF WASHINGTON, *Respondent*, v. A. P. LEONARD,
Appellant.¹

INDICTMENT AND INFORMATION—EMBEZZLEMENT BY PUBLIC OFFICER—DISTINCT OFFENSES—CERTAINTY. An information charging a public officer with the embezzlement of fees collected in the sum of \$165, charges but one offense, and is sufficiently direct and certain as regards the crime charged, although the sum represented different fees collected at different times.

CRIMINAL LAW—TRIAL—OFFENSE UNDER DIFFERENT STATUTES—ELECTION. In a prosecution for embezzlement of fees by a county auditor, it is not error to refuse to require the prosecuting attorney to elect under which of several statutes providing different penalties he will proceed, the acts charged being punishable under any of them.

EMBEZZLEMENT—OF FEES BY SALARIED COUNTY OFFICERS—SUFFICIENCY. An information charging that the defendant is a county auditor who receives a salary and that he collected fees and refused to account for and embezzled the same, charges an offense under Bal. Code, § 1606, making it embezzlement for any salaried county officer to receive fees by virtue of his office and fail to pay the same to the county treasury.

SAME—DEMAND—NECESSITY. In a prosecution of a salaried county auditor for the embezzlement of fees which came into his hands by virtue of his office and which he failed to pay to the county treasurer, it is not necessary to show that any demand was made upon him for the payment of the fees.

SAME—INTENT—INSTRUCTIONS. In a prosecution of a salaried county officer for the embezzlement of fees which he failed to pay

¹Reported in 105 Pac. 163.

into the county treasury, the proposition that a criminal intent is essential is sufficiently covered, where the jury were so instructed, and that they could not convict if the failure to pay was due to neglect or carelessness without an intent to defraud the county.

SAME—EVIDENCE—SUFFICIENCY. The evidence is sufficient to sustain a conviction of embezzlement by a salaried county auditor for failing to pay over \$165 collected for hunting license fees, where there was no question over the defalcation, and no intricacy in the bookkeeping, and the defendant had stated that he knew of the shortage and exactly how much it amounted to; although the defendant after his term had expired, had expressed a willingness to make good the deficiency, the statute requiring monthly payments of such collections.

Appeal from a judgment of the superior court for Pacific county, Rice, J., entered November 21, 1908, upon a trial and conviction of embezzlement. Affirmed.

Charles E. Miller, C. C. Dalton, and W. S. Fulton, for appellant.

John I. O'Phelan, for respondent.

DUNBAR, J.—On July 22, 1908, the prosecuting attorney of Pacific county filed the following information against the appellant in the superior court of said county, the charging part of which is as follows:

“The said A. P. Leonard on or about the 6th day of January, 1907, at the county of Pacific and state of Washington, was the duly elected, qualified and acting county auditor in and for the county of Pacific and state of Washington, and as such county auditor was not allowed by law to be paid or receive any money, fees, or compensation for his services as such county auditor, except the salary provided and allowed to be paid him by law as such county auditor. That as such county auditor it became and was his duty, imposed by law, to receive certain moneys, fees, and deposits by virtue of said office; and that on or about said 6th day of January, 1907, at the said county of Pacific and state of Washington, the said A. P. Leonard, then and there being, did receive and there was paid to him, as such county auditor and by virtue of said office, the sum of one hundred and sixty-five (\$165)

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dollars, lawful money of the United States, of the value of one hundred and sixty-five (\$165) dollars, which said prosecuting attorney is unable to more particularly describe, the same being money, fees, and deposits which was paid to him, the said A. P. Leonard, as county auditor of said Pacific county for 'Hunters' Licenses' and should have been paid and delivered to the treasurer of said Pacific county by him, the said A. P. Leonard, on the first Monday of each month, after receiving the same. That said A. P. Leonard, as such county auditor, having received the said sum of one hundred and sixty-five (\$165) dollars, as aforesaid, at and in said county and state, as aforesaid, then and there being, did then and there, on the 6th day of January, 1907, as aforesaid, unlawfully, wilfully, knowingly, fraudulently and feloniously fail to pay the said sum or any portion thereof to the said county treasurer, as required by law, but unlawfully, wilfully, knowingly, fraudulently, and feloniously, did take and convert to his own use and embezzle the said sum of one hundred and sixty-five (\$165) dollars, received by him as aforesaid. That the said sum embezzled, as aforesaid, was the money and property of the county of Pacific and state of Washington, and that said A. P. Leonard did, by said failure to pay said sum to said treasurer as aforesaid, and by converting the same to his own use, as aforesaid, commit a felony, contrary to the statutes in such cases made and provided and against the peace and dignity of the state of Washington."

To this information the appellant interposed a demurrer, upon the following grounds, (1) that the said information does not substantially conform to the requirements of the code of this state; (2) that more than one crime is charged against this defendant; and (3) that the facts charged in said information do not constitute a crime against the laws of the state of Washington. The demurrer was overruled, plea of not guilty entered, and trial had, which resulted in a verdict of guilty. Judgment and sentence followed, notice of appeal was given, and the proceeding is now in this court on appeal.

The errors assigned are, (1) the overruling of the demurrer to the said information; (2) not requiring the prose-

cuting attorney to elect and designate under what statute he was prosecuting said action; and (3) the refusal of the court to give certain instructions. Chapter 147 of the Laws of 1905, page 277, establishing a license for hunters, provides that it shall be unlawful for any person to hunt etc., without first having obtained a license therefor from the county auditor, prescribing the payment of one dollar for such license by residents of the state, five dollars for nonresidents, and \$50 for any nonresident alien. The statute also provides that the county auditor shall pay to the county treasurer all such fees collected by him, to be placed in the game protection fund to be used by the county commissioners for the propagation and protection of the game of such county. It is urged by the appellant that more than one crime is charged in this information, because the \$165, it is argued, might have included one hundred and sixty-five licenses at one dollar apiece, or thirty-three licenses for nonresidents and three licenses for a nonresident alien, and fifteen resident licenses or three nonresident licenses; that the testimony in the case was that the amount charged as having been embezzled represented one hundred and sixty-five licenses, and that they were issued at different times and to different persons; that the embezzlement, if any, therefore constituted one hundred and sixty-five offenses, each offense taken separately being a misdemeanor; and that, inasmuch as Bal. Code, § 6844 provides that the indictment or information must be direct and certain as regards the crime charged, and that the information must charge but one crime and in one form only, the information is insufficient. This contention is answered in 7 Ency. Plead. & Prac., p. 430, as follows:

“In an indictment against the public or other officer, great looseness is permitted in the description of the money or funds embezzled, because of the necessity of the case, and it is unnecessary to specify with certainty the particular kind of money or funds, whether gold or silver coins, or legal tender notes, or to give the denomination of each coin or

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note, or to specify from whom or at what particular time the money was received, but the indictment should be certain to the extent of alleging the embezzlement of a particular sum of money."

This is almost the universal announcement by courts and law writers on this subject, and arises from the necessity of the case, as it would be impossible to trace the particular fund or particular act or particular requirement from which the fund came, in the case of an officer handling public funds coming through so many avenues and through so many different individuals.

A good case on this subject is *People v. McKinney*, 10 Mich. 53, where the court, in discussing this question and in drawing a distinction between embezzlement by a public officer where the public at large can exercise no control or constant supervision over him nor assume the direct custody of the funds, and embezzlement by a private individual where there can be such constant supervision by the owner of the funds, said, at page 91:

"We cannot, therefore, suppose the legislature intended to require proof of the identity of the money embezzled by the treasurer, or of the kind of funds of which it consisted, or of the particular source from which it was received, without supposing they intended to render the provision they were enacting a dead letter."

See, also, *State v. Dix*, 33 Wash. 405, 74 Pac. 570; *State v. Bogardus*, 36 Wash. 297, 78 Pac. 942.

It is also urged that, inasmuch as this information might have been filed under any one of several sections of the code, viz: Bal. Code, §§ 7119, 7123, 1606, and 7213 (P. C. §§1983, 4004, 1726), it was error not to require the prosecuting attorney to elect and designate under which statute he would proceed. It makes no difference to the appellant that the penalty is different in the different sections. What concerns him are the acts with the commission of which he is charged. *State v. Isensee*, 12 Wash. 254, 40 Pac. 985.

But counsel insists that, while the information was probably filed under the provisions of § 1606, the objection to the prosecution under that statute is that there is no analogy between the subject-matter of the statute and the information. But we think the analogy is very strong. Section 1606 provides that "any county officer who is paid a salary, who shall fail to pay to the county treasury all sums that shall have come into his hands for fees and charges in his office, or by virtue of his office, whether under the laws of this state or of the United States, shall be deemed to be guilty of embezzlement," etc. The information would seem to be drawn exclusively under this section, for it charges the appellant with being a county officer who receives a salary, with receiving money for fees, and for failing to pay the same over to the county treasurer. We hardly see how the information could be any more specific and certain with reference to the requirements of § 1606.

The appellant's third proposition is that, where the moneys are collected in a fiduciary capacity, proof of demand by one authorized to receive payment of such funds is necessary before there can be a conviction for criminal conversion. The appellant has cited no authorities to sustain this proposition, nor do we think that any can be found. It would be a direct encouragement to laxity in official duty, if not to absolute dishonesty, to put any such construction upon the law. Under such construction the officer could retain money that came into his possession for an indefinite length of time. If afterwards, by experting the books or from any investigation, it was found that such moneys had been retained, all he would have to do would be to pay the same upon demand made. If the law were to be construed in this manner, the public funds would become a prey to plunderers and dishonest officers.

The fourth proposition is that the failure of a public officer to pay over funds coming into his possession by virtue of his office must be with a criminal intent to convert the same

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to his own use. This proposition is undoubtedly correct, but the jury were instructed on this subject as follows:

“An essential element in the crime charged in this case is a felonious intent, and before you can convict the defendant you must find from the evidence that he intended to convert to his own use the money in question, and to cheat, wrong, and defraud the county of Pacific out of the same. If you find from the evidence that the failure of the defendant to pay over this money was due to neglect and carelessness, and that he had no intention of cheating and defrauding the county out of the same, your verdict must be not guilty.”

This instruction was given at the instance of the defendant, and the court gave the same instruction in substance on its own motion.

It is contended, also, that the evidence was not sufficient to sustain the verdict; that it was a case of faulty bookkeeping, and that there was no criminal intent shown. The testimony in the case shows that the license fees were for one dollar licenses, or resident licenses, and that the only book kept was one containing the licenses, with a stub attachment to each license issued. There was no intricacy about this bookkeeping. It was a simple proposition of addition and subtraction. The stubs showed so many licenses issued at one dollar per license. The books showed so many dollars turned over to the treasurer from such licenses, and in this instance showed that there had been \$165 more paid in to the auditor than was turned over to the treasurer. In fact, the appellant himself makes no contention that there was any intricate bookkeeping, or that he was misled in that respect, for when asked whether the books showed accurately the amount received by him, he said they did; and in answer to the question: “Any ordinary accountant could take these books and ascertain the amount received?” the answer was: “They certainly could.”

The contention of the appellant is that the law prescribed no particular time at which the money should be turned over

plication was denied; whereupon the relator made application here for a writ of prohibition containing terms of mandate directed to the superior court prohibiting the court from proceeding with the trial.

We think the writ should not be granted. The trial court is proceeding regularly with the trial of the case; it has jurisdiction of the subject-matter, and the granting of the application would be in denial, rather than in the furtherance, of justice. The case falls within the principle of the case of *State v. Fenton*, 30 Wash. 325, 70 Pac. 741, where this language was used:

"This, unlike any other case, is the attempted injection of the habeas corpus proceedings into the trial of another case which is on appeal to this court. When the writ was denied by the lower court, and the applicant remanded, that was the end of the case, so far as the stay of the case then pending was concerned, and must necessarily be so to insure the orderly and effective administration of justice. This court placed a very liberal construction upon the statute when it sustained the right of appeal in habeas corpus cases, and it is not inclined, nor do we think the law compels us, to go to the extent of aiding defendants in criminal actions to prevent indefinitely a trial of causes on the merits by repeated applications for writs of habeas corpus and appeals from the decisions in such cases if the applications are unsuccessful, which would be the result of sustaining appellant's contention. If this contention can be sustained at all, it can be so only on the theory that the appeal by virtue of itself worked a stay of proceedings. If there is a stay, it is by force of the statute, and we are not cited to any statutory provision in that regard. The statutory provisions for a stay in either a civil or criminal action are found in §§ 6506 and 6529, Bal. Code, and neither contemplates a stay in a case of this kind."

The writ is denied.

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[No. 7768. Department Two. November 26, 1909.]

MARY F. NEILSEN, *Respondent*, v. H. O. HOVANDER *et al.*,
Appellants.¹

ASSAULT AND BATTERY—CIVIL LIABILITY—JURISDICTION—PROOF. A violent assault and battery is not excused by showing that the difficulty occurred at a public road which plaintiff had closed up and fenced, and was in possession of at the time defendants attempted to use it.

SAME—ISSUES AND PROOF—JUSTIFICATION. In an action for damages for assault and battery, justification by reason of preventing the defendants from using a public road cannot be shown under a general denial.

PLEADINGS—AMENDMENTS AT TRIAL—TERMS—COSTS—DISCRETION. It is discretionary, on a claim of surprise and inability to proceed with the trial, to refuse leave to amend an answer bringing in a new issue, unless defendants pay all costs, including witness and jury fees that have been paid.

DAMAGES—EXCESSIVE VERDICT—ASSAULT. A verdict in favor of a woman for \$1,000 for an assault and battery, reduced by the trial court to \$750, will not be held excessive on appeal, where it appears that the assault was unprovoked and she was seriously injured, and that it was accompanied by scandalous language tending to defame and vilify her.

Appeal from a judgment of the superior court for Whatcom county, Kellogg, J., entered June 16, 1908, upon the verdict of a jury rendered in favor of the plaintiff, for damages for assault and battery, after a trial on the merits. Affirmed.

Liddy & Lewis (Hardin & Hurlburt, of counsel), for appellants.

Fairchild & Bruce and T. D. J. Healy, for respondent.

CROW, J.—Action by Mary F. Neilsen against H. O. Hovander and Otis Hovander, to recover damages for assault and battery. From a judgment in her favor, the defendants have appealed.

¹Reported in 105 Pac. 172.

Respondent alleged the assault and battery, insulting, profane, and defamatory language used by appellants, and her damages. The answer was a general denial. There was evidence that H. O. Hovander, father of Otis Hovander, owns two farms in Whatcom county, one located immediately west, and the other east of, land belonging to the respondent; that on the day of the assault, the appellants attempted to drive a two-horse team and wagon through respondent's gate and across her land; that she held the gate and forbade them entering; that one of them, with violence and force, opened the gate; and that the difficulty then occurred. The respondent testified that the appellants kicked and beat her; that they struck her with a leather strap; that they used insulting, profane, and defamatory language to her, which she repeated on the witness stand; that she was physically injured; that she was humiliated and chagrined, and that the appellants, with violence and force, did trespass upon and cross her land. In these statements, some of which are denied by appellants, the respondent is corroborated.

The appellants contend that the trial court erred, (1) in excluding competent and material evidence; (2) in failing to give requested instructions; (3) in refusing a new trial; and (4) in entering judgment for the respondent.

To show the existence of an alleged public road established by prescription over the respondent's land at the point where the difficulty occurred, the appellants offered evidence which was excluded by the trial court. They now contend that error was thereby committed, and that the existence or non-existence of the road was a material and important fact for the consideration of the jury. Assuming that appellant could have shown the alleged highway in fact existed, it was nevertheless undisputed that the respondent had fenced and inclosed it as her private property; that she was then, and had been for some time, in exclusive possession; that she had forbidden appellants trespassing thereon, and that they did so with force and violence. If the respondent did in fact

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close or obstruct a legal highway and deprive the appellants of its use, her wrongful act, even though it created a public nuisance, did not excuse their acts in taking the law into their own hands, in making a violent assault, and in committing a breach of the peace, to open the road and abate the nuisance. Appellants, in effect, contend that, in presenting their defense, they were entitled to show the existence of the highway as justification. Their answer contained denials only. No facts or circumstances tending to show justification were pleaded by them.

On the trial they asked permission to amend their answer, by alleging:

"That at the point of the alleged difficulty there was an old public road or highway long in use and established by adverse user and prescription along and through the land of plaintiff as defendants verily believe and so state the facts to be."

The respondent objected to the proposed amendment, claiming surprise, and that she was unprepared to meet the same for want of witnesses. Thereupon the trial judge said:

"The plaintiff in this case would be entitled, if this amendment should be allowed, on their statement (her attorneys) that they would be unprepared to meet the issues as framed, to an allowance of this amendment only on terms. The terms would be, and could not be other than the payment by the defendants of the entire costs of this proceeding up until this time, including witness fees and jury fees that have been paid, on the statement of plaintiff's counsel that they could not proceed further to trial at this time."

To this ruling the appellants excepted. They declined to accept or comply with the terms imposed. The ruling of the trial judge was without error, being a proper exercise of his discretion. The appellants having failed to accept or comply with the terms offered, are in no position to now contend that evidence offered to show the existence of a highway was erroneously excluded.

Other assignments of error are predicated upon the re-

fusal of the trial court to admit evidence of advice of the county attorney given appellants concerning the highway, and also upon the refusal of the trial judge to give certain requested instructions. These contentions are without merit, as in their final analysis they involve the same question that was presented by the exclusion of evidence to show the existence of a county road. The respondent had enclosed the land. It had been fenced for some time. She was in peaceable and exclusive possession. There was evidence tending to show a violent and inexcusable assault upon her by the appellants. The pleadings presented no issue as to the existence of a highway, none being alleged, mentioned, or suggested therein, nor did the appellants affirmatively plead any fact in justification.

“Under a mere general denial, the defendant cannot introduce evidence tending to prove justification of the assault.” 2 Ency. Plead. & Prac., 862.

“Matter of justification cannot be given in evidence under the general issue, but must be pleaded specially, and so fully as to admit proof which will have the effect of exonerating defendant.” 3 Cyc. 1084.

See, also, *Yeska v. Swendrzynski*, 133 Wis. 475, 113 N. W. 959; *Harden v. Hodges*, 33 Tex. Civ. App. 155, 76 S. W. 217.

The appellants further contend that the court erred in refusing a new trial on account of excessive damages awarded under the influence of passion and prejudice. The verdict was for \$1,000. The motion for a new trial was denied on condition that \$250 of this amount be remitted, which was done. The appellants, however, contend that \$750, for which final judgment was entered, is still excessive. There was sufficient evidence to show that respondent was seriously injured; that the assault was unprovoked, violent, and vicious; and that it was accompanied by language of a scandalous and profane character used by appellants, which tended to defame and vilify her. In view of all the circumstances and

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the action of the trial judge, we cannot conclude that we should hold the damages awarded are still excessive.

The judgment is affirmed.

RUDKIN, C. J., MOUNT, PARKER, and DUNBAR, JJ., concur.

[No. 8278. Department Two. November 26, 1909.]

JOHN M. WELCH *et al.*, *Respondents*, v. SEATTLE AND
MONTANA RAILROAD COMPANY *et al.*, *Appellants*.¹

TRESPASS—AT COMMON LAW—LIMITATIONS. Whether an action is for a trespass upon real property, within the statute of limitations, depends upon what was deemed trespass at common law.

LIMITATION OF ACTIONS—TRESPASS TO REAL PROPERTY—WHAT CONSTITUTES. An action by tenants of a building for damages resulting from tunneling under the property is not an action of trespass, within the three-year statute of limitations, Bal. Code, § 4800, where the damages were largely consequential for injury to business and loss of profits, and by reason of cutting off access; and must be commenced within two years within the provisions of Bal. Code, § 4805, for actions not otherwise provided for.

Appeal from a judgment of the superior court for King county, Tallman, J., entered March 17, 1909, upon the verdict of a jury rendered in favor of the plaintiffs, in an action in tort, after a trial on the merits. Reversed.

F. V. Brown and *Frederic G. Dorety*, for appellants.

Stephen V. Carey and *Jay C. Allen*, for respondents.

DUNBAR, J.—This action was brought by the plaintiff and respondent John M. Welch, who is a saloon keeper, and his wife, to recover compensation for loss of business resulting from damage to the building which he occupied as a saloon at the time of the construction of the Great Northern tunnel in Seattle. The complaint alleges, in substance, that

¹Reported in 105 Pac. 166.

the defendants, in the construction of said tunnel, excavated through, across, and underneath the surface of lot 10, in block G, particularly through, across and underneath that portion of said lot covered by plaintiffs' building, held under a certain lease; and that, in constructing the work therein and thereon, the defendants at divers and sundry times caused to be set off and discharged blasts of dynamite, giant powder, and explosives of different kinds, and did remove from off said lot and from underneath the surface, and particularly from that portion thereof so covered by said building, certain of the soil; that by reason thereof the surface of said lot 10, and that portion of it covered by said building, subsided and slid and moved westward, by reason whereof the said building settled, collapsed, and moved from its foundation, and was rendered dangerous and unfit for occupation; and by reason thereof the plaintiffs' business was disturbed and interrupted, and that the plaintiffs were thereby damaged. The answer denied that plaintiffs were damaged by reason of any of the acts of defendants. Reply was made to certain affirmative allegations, which it is not necessary to discuss here. The case went to trial, and judgment was rendered in favor of the plaintiffs.

The defendants raised the question of the statute of three-year limitation, the statute of two-year limitation, and the fact that the lease under which the plaintiffs held the property alleged to have been damaged should have been construed to be a lease from month to month. The court instructed the jury that the two-year statute of limitations did not apply to the case, and that they need not consider it. In this we think the court erred, and upon this question hinges the fate of this case. If the three-year statute applies to an action of this kind, it must be brought within the provision of paragraph 1 of Pierce's Code, § 285 (Bal. Code, § 4800), viz., an action for waste or trespass upon real property. If it does not, then it falls within § 289a (Bal. Code, § 4805), which provides that "An action for relief not here-

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inbefore provided for, shall be commenced within two years after the cause of action shall have accrued."

It is the established rule of this court that the question of whether an action is an action for trespass upon real property depends upon what was deemed trespass at the common law, and in order to determine that question it is necessary to examine the common law authorities. In 2 Cooley's Blackstone (4th ed.), *page 208, the author says that, "Trespass in its largest and most extensive sense, signifies any transgression or offence against the law of nature, or society, or of the country in which we live; whether it relates to a man's person, or his property." But that "in the limited and confined sense in which we are at present to consider it, it signifies no more than an entry on another man's ground without a lawful authority, and doing some damage, however inconsiderable, to his real property." The essential idea seems to have been the breaking of a close by force, the words of a writ of trespass commanding the defendants to show cause *quare clausum querentis fregit*; and it was frequently called trespass *vi et armis*. So great a regard did the law have for a man's close or premises that it presumed damages would accrue from the breaking into or penetrating such close, even if it was no more than the trampling of the herbage therein. An action setting forth such facts as these was an action in trespass, as distinguished from what was designated an action on the case, where the injury resulting from the action was not caused by direct force, but was consequential or an injury resulting indirectly from the act complained of. Mr. Blackstone, on *page 123 of Book 3 (Lewis's ed.), makes a distinction as follows:

"And it is a settled distinction, that where an act is done which is in itself an *immediate* injury to another's person or property, there the remedy is usually by an action of trespass *vi et armis*; but where there is no act done, but only a culpable omission, or where the act is not immediately injurious, but only by *consequence* and collaterally, there no

action of trespass *vi et armis* will lie, but an action on the special case, as the damages consequent on such omission or act."

If the allegations in the complaint in this case and the proof show that the action was direct and with force upon the respondents' property, then the action is properly an action in trespass, and the two-year statute will not apply. But if it is indirect or consequential, the two-year statute will apply. It will be seen by referring to the complaint that the damages sought are not damages to the freehold or to the house, but the demand is compensation for loss of business. The respondents had no interest in the value of the premises leased. In this case the right was withheld to sell the property subject to the lease, and it was afterwards sold to the appellants in this case. So that the damage, if recovered at all, must be for injury to the business. In fact, construing the complaint in connection with the proofs in the case, it shows that the greater part, if not all, of the damage was purely consequential. It was claimed and shown by the testimony that access to the respondents' place of business was cut off by reason of a certain action of the appellants, so that it was difficult for customers to reach their place of business, and that they could not reach it from certain directions from which they had reached it before.

This is not a new question before this court. In *Sargent v. Tacoma*, 10 Wash. 212, 38 Pac. 1048, this court said, in speaking on this subject:

"If actions of this kind are regarded as trespasses upon real property, the three years' limitation created by Code Proc. § 115, covered this case; but if they are not, then Code Proc. § 120, limiting actions for relief not otherwise provided for to two years, did cover it."

In *Suter v. Wenatchee Water Power Co.*, 35 Wash. 1, 76 Pac. 298, 102 Am. St. 881, it was held that an action for damages to real property through an overflow caused by the defendant's negligent construction of an irrigating canal,

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lawfully built but without sufficiently providing for carrying off the surplus water or controlling the flow, is not an action for trespass within the purview of the three-year limitation for actions for trespass upon real property, since the damages are consequential only and not direct, as required to create trespass at common law, and such action is barred if not commenced within two years from the time the damage accrued; the court citing the case of *Hicks v. Drew*, 117 Cal. 305, 49 Pac. 189, where it was held that the erection of a bulkhead on one's own land, whereby the lands of another are flooded, is not a trespass, and where the following statement was made:

"While in this state all distinctions between common-law actions are abolished as relating to the procedure, yet it is plain that we are bound to consult the common law, and the classification of common-law actions, for the proper determination as to what the law-making power of this state had in mind when using the phrase 'trespass upon real property.'"

And in closing that opinion the court said:

"One of the best tests by which to distinguish trespass is found in the answer to the question, When was the damage done? If the damage does not come directly from the act, but is simply an after result from the act, it is essentially consequential, and no trespass."

This court endorsed the statements made by the California court, and after citing many cases which it is not necessary to review here, held that the statute of limitations had run against the action in question. In this class of cases it is sometimes difficult to draw the line of distinction. But, considering the history of the two classes of actions, viz., trespass and trespass on the case, we think that the damage claimed must be the direct result of the action complained of, the result of a physical invasion of the thing which is claimed to have been injured, and that the complaint in this case, especially construed in connection with the proof which was made and which tended to elucidate the character of the dam-

ages claimed, plainly shows that there was no such physical invasion, and that the damages resulting were incidental and consequential.

Inasmuch as it is conceded in the reply that the action was not brought within two years from the expiration of respondents' lease, it will be impossible for the respondents to recover, and the judgment will be reversed, with instructions to dismiss the action.

RUDKIN, C. J., CROW, PARKER, and MOUNT, JJ., concur.

[No. 8363. Department Two. November 26, 1909.]

JOHN A. ROEBLING'S SONS COMPANY, *Appellant*, v.
WASHINGTON ALASKA BANK, *Respondent*,
J. H. SMITH *et al.*, *Interveners and*
Respondents.¹

SALES—RESCISSION—TIME FOR DELIVERY. Upon the sale in August of goods to be delivered at F. in Alaska before the close of navigation, the vendees may rescind the sale in March for failure to deliver the goods before the close of navigation.

SALES—PERFORMANCE—RESCISSION—DELIVERY AND CHARACTER OF GOODS. Where, in order to secure wire cable before the close of navigation, the vendee agreed to take cable of a larger size than desired, then held in stock by the vendor, and agreed to pay the freight, and in the following March rescinded the sale for non-delivery and ordered cable of the smaller size to be delivered by the first steamer, to which the vendor replied that the goods would be shipped by the first steamer, without specifying the size, the order was for the smaller size, justifying the vendees in refusing to accept larger cable on which the freight charges were \$400 in excess of charges on the smaller cable.

SALES—DELIVERY—PLACE. An agreement to deliver cable at F., in Alaska, is not performed by delivering the same at C., ten miles distant from F.

SALES—RESTING IN PAROL—WRITTEN ESCROW—EVIDENCE TO VARY WRITING. Where there was an oral sale of cable and other articles of a certain size, to be delivered at F., Alaska, before the close of

¹Reported in 105 Pac. 174.

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navigation, upon which the purchase price was deposited in bank under a written escrow agreement which did not specify the time for delivery nor the size of the cable, the contract may be proved by parol, as the escrow was only for the purpose of defining the duties of the bank and did not purport to state all the terms of sale.

COSTS—TAKING DEPOSITIONS—ALLOWANCE. Where it appears that \$100 was actually expended in taking depositions, an allowance of \$40 costs therefor will not be disturbed on appeal.

Appeal from a judgment of the superior court for King county, Albertson, J., entered June 9, 1909, upon findings in favor of the defendants, in an action on contract, after a trial before the court without a jury. Affirmed.

Million & Houser, for appellant.

H. R. Clise, for respondent.

Wm. Martin, Julius L. Baldwin, and John F. Dillon, for interveners and respondents.

MOUNT, J.—The appellant brought this action against the Washington Alaska Bank of Fairbanks, Alaska, to recover \$1,900. This money was alleged to have been deposited in the bank, to be paid to the appellant upon delivery of two reels of eight hundred feet each of suspension bridge cable, twelve Crosby wire rope clips, and four four-inch turnbuckles, at the town of Fairbanks, Alaska; that the goods were delivered, but the bank refused to pay over the money. The bank answered, in substance, that it had received the money as alleged in the complaint, but that the goods had not been delivered, and that the persons who deposited the money had demanded the return thereof; that it holds the money for the persons entitled thereto, and is ready and willing to pay the same to the party legally authorized to receive it.

Thereafter J. H. Smith, W. H. McPhee, E. R. Peoples, and J. E. Doherty intervened in the action, and alleged that they, as a committee of citizens of the town of Fairbanks, had been authorized to collect money to purchase materials for

the construction of a bridge across the Chena river, in said town; that on August 15, 1906, they entered into a contract with the plaintiff, whereby the plaintiff agreed to deliver, at the town of Fairbanks, before the close of navigation of that year, two reels each of eight hundred feet galvanized suspension bridge cables, one and one-half inches in diameter, and the other articles named in the complaint, for the price of \$1,900, plus the freight from Seattle to Fairbanks, payable on delivery of the goods at Fairbanks; that on the same day an escrow agreement was entered into, and \$1,900 was paid by them into the bank, to be paid to the plaintiff upon the arrival of the goods at Fairbanks; that the plaintiff failed to deliver the goods as agreed upon, or at all, and subsequently the interveners demanded a return of the money deposited with the bank.

The plaintiff, for reply to the answer in intervention, after denying certain allegations of the answer, alleged that the contract of sale was in writing as contained in the escrow agreement; that the goods were delivered as agreed upon; and that the interveners had neglected and refused to pay the freight and storage charges, amounting to \$1,250 upon the goods after they left Seattle. Plaintiff prayed for a judgment against the interveners in the sum of \$1,250. Upon these issues the case was tried to the court without a jury. The court made findings of facts substantially in accordance with the allegations of the answer in intervention, and entered a judgment in favor of the interveners for the \$1,900 held by the bank, and dismissed the plaintiff's complaint. The plaintiff has appealed.

We think there is no substantial dispute upon the facts. It appears that in August, 1906, the citizens of Fairbanks, Alaska, desired to construct a bridge across the Chena river in that town; that for such purpose the citizens selected the interveners as a committee to purchase materials for the bridge. This committee desired two reels of suspension bridge cable, each cable eight hundred feet in length and one

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and one-half inches in diameter. They also desired the other articles named in the complaint. The plaintiff's agent, George H. Abbott, was upon the ground and desired to furnish the articles named. He represented that he could not furnish the one and one-half inch cable at once, because it was not held in stock by the plaintiff, but that the plaintiff had on hand the required amount of two and one-fourth inch cable, which could be shipped at once and would be sold at the price of the one and one-half inch cable. The plaintiff's factory was located at Trenton, New Jersey, but it maintained a branch office at Seattle in this state. The committee desired the goods before the close of navigation in the fall of 1906; and, in order to obtain the same at that time, agreed to accept the two and one-fourth inch cable, and in addition to the purchase price of \$1,900 agreed to pay the freight from Seattle to Fairbanks. It was then also agreed that the purchase price, \$1,900, should be collected from the citizens and placed in the Washington Alaska Bank, at Fairbanks. The money was collected and was deposited in the bank with the following escrow agreement:

"The sum of nineteen hundred (\$1900) dollars herewith deposited in escrow with the Washington-Alaska Bank of Fairbanks, Alaska, is for the payment of two (2) reels of eight hundred (800) feet each of galvanized suspension bridge cables; twelve (12) Crosby wire rope clips and four (4) inch (4'') turnbuckles. Said nineteen hundred (\$1900) dollars to be forwarded immediately upon the arrival of above mentioned equipment to John A. Roebling's Sons Company, Seattle, by the Washington Alaska Bank. It is mutually understood and agreed by and between George H. Abbott, representing John A. Roebling's Sons Company, and the committee whose names are signed hereto as representing the Citizens Committee who act as purchasers of aforesaid material, that the sum of nineteen hundred (\$1900) dollars is in payment for said material delivered in Seattle, Washington, and that all freight charges between Seattle, Washington, and Fairbanks, Alaska, are to be defrayed and paid by said committee upon arrival of material in Fairbanks.

Above specified material is consigned to the Washington-Alaska bank, and will be turned over to said committee on its arrival in Fairbanks upon payment of freight charges as set forth in the foregoing: And I, George H. Abbott, representing John A. Roebling's Sons Co., do hereby authorize the Washington Alaska Bank of Fairbanks, to act as custodian of said nineteen hundred dollars, and to forward the same to John A. Roebling's Sons Co. on arrival of material in Fairbanks. Signed this 15th day of August, 1906.

"For the buyers: Citizens Committee of Fairbanks, Alaska. J. E. Doherty, W. H. McPhee, E. R. Peoples and J. H. Smith. For the Seller: John A. Roebling's Sons Co., By George H. Abbott."

The goods arrived at the Seattle office too late to be shipped in the fall of 1906. On March 17, 1907, the committee, through its secretary, wrote the following letter to the plaintiff's Seattle office:

"John A. Roebling's Sons Co.

"Gentlemen: Your Mr. George H. Abbott entered into an agreement with our citizens committee, Aug. 15, 1906, to deliver at once two reels of eight hundred feet each of bridge cable, twelve Crosby wire rope clips and four turnbuckles. Nineteen hundred dollars was placed in escrow with the Washington-Alaska Bank to be turned over to your firm upon the arrival of said cable. Your Mr. Abbott informed us he wired you that you had for immediate shipment the cable in two inch in diameter, but was out of one and one-half inch—the kind desired with steel core. We agreed to accept the two inch cable as it was all you had on hand at that time, but it was to be shipped at once so as to arrive here before the close of navigation. Now we have never heard a word from you or your agent Mr. Abbott; nor have we seen sight of the cable; this does not look good to us from a business standpoint, and now want that you should ship us the two cables one and one-half inch in diameter as we originally wanted, and want it shipped by May 25th, via Dawson, so as to arrive here on first steamer. Hoping you will see to this matter at once, we remain,

"Truly yours, Joseph H. Smith,
"Sec. Lacey Street Bridge Fund."

This letter was received at Seattle on May 8, 1907, and was answered as follows:

"Jos. H. Smith, Esq., Lacy Street Bridge Fund,
"Fairbanks, Alaska.

"Dear Sir: We beg to advise you that the order placed by you will leave Seattle on the first boat sailing for Dawson. We advised Mr. Abbott by cable his order had been received too late to ship last fall. We have had the material in stock all winter, and should have liked very much to have shipped in time for your requirements. The conditions are such however it was absolutely impossible for us to do other than we have done. Thanking for the order and trusting you will receive the same in good order, we beg to remain,
Yours very truly,

"John A. Roebling's Sons Co.,
"W. F. Richardson, Mgr."

Instead of shipping the one and one-half inch cables as ordered, the plaintiff shipped the two and one-quarter inch cables, which arrived at Chena, Alaska, about July 1, 1907. Chena is about ten miles distant from Fairbanks. The committee refused to receive the larger cables at that time, and refused to pay the freight thereon, which was about \$400 in excess of what the freight on the smaller cables would have been. The committee thereupon demanded of the bank the return of the money deposited therein. The cables were never delivered at Fairbanks, but remained in storage at Chena, Alaska.

It is clear that the plaintiff did not deliver the two and one-fourth inch cables at Fairbanks in the fall of 1906. These cables were not shipped from Seattle until after May 1, 1907. Hence, if the contract was that the large cables should be delivered during the fall of 1906, plaintiff did not comply with the terms of its contract. The letter of March 17, 1907, from the defendant to the plaintiff, was a clear rescission of the order for the two and one-fourth inch cable. This letter stated: "We . . . now want that you ship us the two cables one and one-half inches in diameter as we originally

wanted and want it shipped by May 25, via Dawson, so as to arrive here on the first steamer." In answer to this letter no mention is made of the fact that larger cables would be shipped, but it was stated: "We beg to advise you that the order placed by you will leave Seattle on the first boat sailing for Dawson." Upon the receipt of this letter the defendant had a right to assume that the smaller cables which they desired would be shipped. If the contract was for delivery of the larger cables at Fairbanks during the year 1906, the committee certainly had a right to countermand that order when such cables were not delivered as agreed, and when the plaintiff had not parted with possession. They did so countermand the order on March 17, 1907. When the larger cables were shipped in 1907 and arrived at Chena within ten miles of Fairbanks, the interveners were also within their legal rights when they refused to accept the larger cables after having ordered the smaller ones.

It is argued by the appellant that the terms of the contract between the appellant and the committee were stated in the escrow agreement, and that oral evidence was not admissible to vary or contradict this agreement. Under the terms of this escrow agreement the \$1,900 was to be paid to the appellant "on arrival of material at Fairbanks." The material never reached Fairbanks. It is still at Chena, ten miles distant therefrom, so far as the record in this case shows. This escrow agreement is silent upon the size of the cables and upon the time of delivery. It could not reasonably be contended that, if the appellant had shipped the cables so small or so large as to be utterly useless to respondent, appellant could still recover the price agreed upon. It is apparent that the size of these cables had much to do with fixing the price and the freight charges, and that this was a material part of the contract of sale. It is apparent upon the face of this writing that it was only for the purpose of defining the nature of the deposit and the duties of the bank where the money was deposited, and that such agreement

contained only such part of the contract of sale which had theretofore been entered into between the appellant and the committee as was necessary to show the purpose of the deposit and the duties of the bank with reference thereto, and was not intended to contain all the terms of the contract of sale. The evidence clearly shows that the contract of sale between the appellant and the committee as originally made rested in parol. It was therefore susceptible of proof by parol. The only written evidence of the terms of the contract of sale is what appears in the escrow agreement and the letters above copied, which were all written after the contract was made. These writings do not vary the terms of the contract as relied upon by the respondents, and there was no attempt to vary or contradict these writings by parol. We are satisfied from the evidence that the appellant failed to deliver the goods within the time, or of the size, agreed upon, and that the trial court found correctly upon these points.

It is argued that the court erred in allowing \$40 as costs of taking certain depositions. It appears by affidavit to the cost bill that \$100 was actually expended therefor. We find nothing in the record to indicate that the sum allowed by the court was not the necessary expense of taking the depositions, and must therefore decline to disturb this order.

No error appearing in the record, the judgment is affirmed, with costs to the respondent interveners and also to the respondent bank.

RUDKIN, C. J., DUNBAR, PARKER, and CROW, JJ., concur.

[No. 8367. Department One. November 27, 1909.]

OTTO BEYER, *Respondent*, v. MARY P. BULLOCK *et al.*,
Appellants.¹

PLEADING—DEMURREE—JOINDER IN. A general demurrer by two or more defendants should be overruled if the complaint states a good cause of action against either defendant.

PAYMENT—APPLICATION—FAILURE TO DIRECT. Where a defendant in two suits paid \$600 to the attorneys representing the plaintiffs in both suits, upon an agreement that both suits be dismissed, defendant cannot claim error in the application of half the sum to each claim, where she failed to direct the application at the time of payment.

Appeal from a judgment of the superior court for King county, Morris, J., entered December 28, 1908, upon findings in favor of the plaintiff, in an action on contract, after a trial before the court without a jury. Affirmed.

Geo. McKay, for appellants.

Oliver F. Cutts, for respondent.

Gose, J.—This action was commenced for the purpose of foreclosing a lien upon two blocks of corporation stock, evidenced by separate certificates, and to have the appellant Mary P. Bullock personally held as a trustee for certain dividends, which it was alleged she had received on the stock and failed to account for or pay over. The respondent held one of the certificates by a direct assignment from Walter F. Plunkett, the appellant's intestate, and the other, together with the indebtedness it secured, by assignment from Charles H. Beyer, to whom it had been assigned by Plunkett. Each of the certificates was assigned by Plunkett as security for certain indebtedness. After Plunkett had assigned the one certificate to the respondent, he assigned his interest in it to the appellant, subject to the indebtedness which it secured.

¹Reported in 105 Pac. 155.

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The title to the Charles H. Beyer certificate, subject to the indebtedness against it, was owned by Plunkett at the time of his death. The appellants jointly demurred to the complaint, on the ground that several causes of action had been improperly united. The demurrer being overruled, they answered jointly, renewing the objection. There was a decree for the plaintiff, from which this appeal was taken.

The first error is assigned to the overruling of the demurrer. Where two or more defendants unite in a demurrer to the complaint and a good cause of action is stated against one or more of them, the demurrer will be wholly overruled, and the same rule will be applied to an answer. Pomeroy, Code Remedies (3d ed.), §606. A good cause of action was stated against the appellant as administratrix of the Plunkett estate, and the demurrer was therefore properly overruled.

Prior to the commencement of the action, the respondent and Charles H. Beyer each commenced an action against the appellant, as administratrix, to require her to pay certain dividends, which in each case it was alleged she had received on the stock. These suits were commenced before Charles H. Beyer had assigned his certificate to the respondent. Thereafter and on April 4, 1907, the appellant administratrix paid to the attorneys for the plaintiffs therein, they being each represented by the same counsel, the sum of \$600 for the purpose of having the suits dismissed. A receipt was given her at the time of payment, stating that the money had been paid in the two cases. One-half the payment was applied upon the indebtedness in favor of the respondent, and the balance was applied upon the indebtedness in favor of Charles H. Beyer. This action was commenced in December, 1907, and about eight months after such payment. The contention is now made that the entire \$600 was the individual money of the appellant Bullock, and that it should all be applied upon the indebtedness secured by the stock she now owns. She made no such claim at the time of pay-

ment. At that time she not only failed to direct the application of the money, but accepted a receipt in her representative capacity. This is made clear by the testimony of the attorney to whom she made the payment. It further appears from his testimony, and is not denied, that the money was paid upon the distinct agreement that both suits should be dismissed. We think, in view of that fact, the money was correctly applied, and the judgment will therefore be affirmed.

RUDKIN, C. J., CHADWICK, and FULLERTON, JJ., concur.
MORRIS, J., took no part.

[No. 8118. Department One. November 30, 1909.]

L. M. DENNIS, *Appellant*, v. NELSON GARY, *Respondent*.¹

HIGHWAYS—PRESCRIPTION—PERMISSIVE USE — EVIDENCE — SUFFICIENCY. A public road by prescriptive use is not shown where it appears that the road was constructed and used almost exclusively as a logging road under written leases, and no public money was spent on it.

SAME—EVIDENCE—ISSUES AND PROOF. In an action to declare a road a public highway by prescriptive use, it is admissible, under a general denial, to show that the use was only permissive under a lease.

Appeal from a judgment of the superior court for Cowlitz county, McCredie, J., entered February 2, 1909, upon dismissing an action for an injunction, after a trial on the merits before the court without a jury. Affirmed.

Imus & Stone and *Jeffers & Lenon*, for appellant.

O'Neill & Leonard, for respondent.

Gose, J.—This action was instituted for the purpose of having a certain roadway or logging road declared to be a

¹Reported in 105 Pac. 172.

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public highway, and to enjoin the respondent from obstructing it. There was a decree for the respondent denying the relief sought, from which the appeal is prosecuted.

The evidence shows conclusively that the construction of the roadway commenced in 1896, and that it was completed in 1897; that it was built as a logging road by placing poles parallel five or six feet apart so that cars could be hauled over them, first by horse power and later by means of an engine; that the parties who constructed and used the road for the conveyance of logs, and their successors in interest in the logging business other than the appellant, used it by permission under written leases until 1907; that it has been used almost exclusively as a logging road in the manner stated; that no public money has been expended upon it; and that it has never been treated or used as a public highway. The evidence does not show any use of the road of any magnitude other than by the parties who constructed it, their successors in interest and employees. The complaint alleged that the road was used by the public for thirteen years. This was denied by the answer. The court permitted the respondent to introduce certain leases in evidence, showing a permissive use of the road. It is contended that the leases were not admissible as evidence under a general denial. The theory of the appellant was that the road had become a public highway by prescription. Upon a general denial it was therefore competent to show that the use had been permissive and not adverse. *Penter v. Staight*, 1 Wash. 365, 25 Pac. 469; *Scheller v. Pierce County*, 55 Wash. 298, 104 Pac. 277. Moreover a permissive use was abundantly established by competent parol testimony to which no exception was reserved.

Finding no error in the record, the decree will be affirmed.

RUDKIN, C. J., FULLERTON, CHADWICK, and MORRIS, JJ.,
concur.

[No. 8272. Department Two. November 30, 1909.]

A R. McMILLAN *et al.*, Respondents, v. C. E. WRIGHT,
Appellant.¹

CONTRACTS—VALIDITY—PUBLIC POLICY—PUBLIC LANDS—ARID LAND ENTRY FOR USE OF ANOTHER. Under the Carey Act, 28 U. S. Stat. at Large 422, granting arid land to the states to be sold "in small tracts to actual settlers," and the laws of Idaho requiring a settler, upon final proof, to make oath that he has entered the land for his sole benefit, an oral contract by a prospective settler to enter land in trust for another, who advanced money for expenses, contemplates perjury, and is void as against public policy.

SPECIFIC PERFORMANCE—ISSUES AND PROOF—EQUITY. Upon allegation and proof of a contract, made in ignorance of the fact that it was void as against public policy, whereby an entryman on arid land was to deed a part thereof to another after he had obtained title, a court of equity will not compel an assignment of part of the land to enable the trustee to enter and obtain the land himself by complying with the law.

SPECIFIC PERFORMANCE—ACTIONS—DESCRIPTION. A contract to convey part of a tract of land cannot be specifically enforced where the specific portion to be conveyed is not designated.

Appeal from a judgment of the superior court for Pierce county, Clifford, J., entered June 9, 1909, upon findings in favor of the plaintiffs, in an action for specific performance, after a trial before the court without a jury. Reversed.

Homer F. Norris and *T. W. Hammond*, for appellant.

Guy Cox, for respondents.

Crow, J.—Action by A. R. McMillan and E. E. McMillan against C. E. Wright, to establish a trust in and to forty acres of land, and compel a conveyance thereof. From a decree in plaintiffs' favor, the defendant has appealed.

The respondents allege, that in August, 1907, they and appellant became interested in arid lands in Idaho, and agreed that appellant, for the benefit of respondents and himself,

¹Reported in 105 Pac. 176.

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should file upon one hundred and sixty acres, in an irrigation district formed under the Carey act; that respondents were to meet one-fourth of all expenses and one-fourth of the payments for the land and water rights; that as soon as the entry had been perfected and water rights secured, appellant was to execute to respondents an assignment of his rights as original entryman, for forty acres of land, with appurtenant water rights; that in pursuance of the agreement respondents advanced funds to appellant, who used the same in filing on one hundred and sixty acres, in securing water rights, and in making the first payments; that appellant afterwards tendered to respondents the money they had advanced, which they refused; that they are entitled to an assignment of appellant's interest as entryman in and to forty acres of the land, and the water rights therefor, and that the appellant has refused to assign or convey the same. The complaint contains other allegations not material to our present consideration. Answering, the appellant admitted that he had filed on the land, but denied the making of the alleged contract.

The only witness on the trial was E. E. McMillan. From his evidence it in substance appeared that, by an oral agreement, it was stipulated that appellant was to attend a drawing for arid lands in the state of Idaho; that if successful he was to file upon one hundred and sixty acres, secure water rights, use money advanced by respondents as part payment in so doing, and when he obtained a good title convey forty acres thereof to respondents. He testified in part as follows:

"Q. Before Mr. Wright went there, was there any understanding between you and him as to when you were to receive your proportion of the land? A. We always understood that we were to get a clear title to the land just as soon as he got it. The Court: That is as you understand it? A. He promised to give us clear title to the land as soon as he was legally able to do it. Q. Did you understand at that time when you were to get your deed or what it would be necessary for you to do before you got a clear title to the

land? A. He said we would have to improve at least one-eighth of the land before we could get clear title to it—a certain portion of it.”

From this evidence it is manifest that no assignment or conveyance was to be made by appellant until the improvements had been made, and he had obtained a clear title by final proof and patent. It fails to support the allegations or theory of the complaint that appellant contracted to transfer his rights as entryman, in and to forty acres, before making final proof or obtaining clear title. The law of Idaho is in part pleaded by respondents in their complaint, in the following language, and admitted by the appellant:

“That it is provided by the laws of the state of Idaho, among other things, as follows:

“(1) That the selection, management and disposal of the lands granted to the state pursuant to the Carey law shall be vested in the state board of land commissioners who are authorized to make such rules and regulations as may be necessary in order to carry out the purposes of the act; that any citizen may make application under oath to the board to enter any of the said land in an amount not to exceed one hundred sixty (160) acres for any one person. The applicant is required to set forth that the person desiring to make such entry does so for the purpose of actual reclamation, cultivation and settlement in accordance with the act of congress, and the laws of this state relating thereto . . .

“(2) That within one year after he shall be notified that water is ready to be furnished for irrigating the land, the settler shall cultivate and reclaim not less than one-sixteenth (1-16) part of the land tillable and within two years after the said notice, the settler shall have actually irrigated and cultivated not less than one-eighth ($\frac{1}{8}$) of the land filed upon and within three years after the date of such notice, the settler shall make final proof of reclamation, settlement or occupation in substance as required by the form set out herein below.”

Then follows a blank form affidavit to be filed by the entryman in making final proof and obtaining title, in which under

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oath he states: "That I entered this land for my sole benefit."

The appellant contends, that this is an action for the specific performance of an oral contract to convey lands; that the contract disclosed by the evidence of the respondent E. E. McMillan was against public policy, and cannot be enforced; that it is the manifest intention of the Federal and Idaho laws that actual settlers only shall be permitted to obtain the benefits of the Carey act, and that an entryman's application to purchase should be for his own sole use and benefit. The Federal statute, 28 U. S. Stat. at Large, 422, provides:

"That to aid the public land states in the reclamation of the desert lands therein, and the settlement, cultivation and sale thereof in small tracts to actual settlers, the Secretary of the Interior . . . is authorized . . . to donate, grant and patent to the state . . . not exceeding one million acres in each state, as the state may cause to be irrigated, reclaimed, occupied, and not less than twenty acres of each one hundred and sixty acre tract cultivated by actual settlers, . . . As fast as any state may furnish satisfactory proof . . . that any of said lands are irrigated, reclaimed and occupied by actual settlers, patents shall be issued to the state or its assigns for said lands so reclaimed and settled. . . ."

It is manifest from the Federal and Idaho laws that the lands were to be granted to actual settlers only, and that before a settler could make final proof and obtain title by a patent from the state of Idaho, he would be compelled to make oath that he had resided on the tract, and that he had entered the land for his sole use and benefit. If the contract proven by the evidence of the respondent E. E. McMillan be specifically enforced, the appellant will, by the decree of a court of equity, be compelled to commit an act of perjury in taking the required oath when making final proof. He must make an affidavit stating that he had entered the one hundred and sixty acres for his sole use and benefit, when, if E. E. McMillan's statement be true, he in fact entered

forty acres thereof for the use and benefit of the respondents, or in trust for them. Appellant in his answer denied the making of any contract, and now contends that the oral agreement shown by the evidence of the respondent E. E. McMillan is so manifestly tainted with fraud, and so clearly contemplates an act of perjury that it will not be enforced by the decree of any court of equity. This contention must be sustained. *Moore v. Moore*, 130 Cal. 110, 62 Pac. 294, 80 Am. St. 78; *McGregor v. Donnelly*, 67 Cal. 149, 7 Pac. 422; *Kine v. Turner*, 27 Ore. 356, 41 Pac. 664; *McCrillis v. Copp*, 31 Fla. 100, 12 South. 643; *Fleischer v. Fleischer*, 11 N. D. 221, 91 N. W. 51; *Mellison v. Allen*, 30 Kan. 382, 2 Pac. 97; *Anderson v. Carkins*, 135 U. S. 483, 10 Sup. Ct. 905, 34 L. Ed. 272. In *Kine v. Turner*, *supra*, the court said:

“And again, it seems to us, the contract is in violation of the manifest theory of the act of 1885, which is that the land should be sold only to bidders desiring it for their own exclusive use and occupation. It requires each purchaser to make oath or affirmation, at the time of making his purchase, that he is purchasing the land for ‘his own use and occupation and not for or on account of or at the solicitation of another, and that he has made no contract whereby the title shall directly inure to the benefit of another’; and, before patent shall issue, he is required to make ‘satisfactory proof that he has resided upon the lands purchased at least one year and has reduced at least twenty-five acres to cultivation.’ These provisions clearly indicate the policy of the government to dispose of the lands for the actual use and occupation of the purchaser, and not for speculative purposes; and, while it may be true that the act contains no express prohibition against a contract of alienation made before the purchase, yet it cannot be consummated in such case without perjury; and the courts have uniformly, and with one voice, declared that a court of equity will have nothing to do with the enforcement of a contract which can only be carried out by perjury, and which was entered into in defiance of the clearly expressed will of the government.”

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In *Mellison v. Allen*, *supra*, Brewer, J., said:

“That a contract whose consummation necessarily rests on perjury is illegal; that both purchaser and vendor are parties to the wrong; and that the courts refuse to enforce such a contract, not from any regard to the vendor, but from motives of public policy; and, finally, that courts of equity have always exercised a discretion in enforcing the specific performance of contracts to convey, and that it would be strange indeed if a court of equity lent its aid to enforce the performance of a contract founded upon perjury, and entered into in defiance of a clearly expressed will of the government.”

The respondents in their brief seem to appreciate the force of these authorities, but seek to avoid their application by making the following suggestion:

“The evidence was that appellant promised to give respondents clear title to the forty acres as soon as he was legally able to do so. The parties at the time the agreement was made did not know the requirements of the Idaho law. It is clear that appellant could not make a contract to prove up for respondents, since to do so would make it necessary for him to swear falsely. He can legally, by deed of assignment, transfer his interest in forty acres now and give respondents clear title in so far as he is concerned. Before the respondents can secure a patent they must become residents and reclaim a part of the land.”

The difficulty with this contention is that it seems to rest upon the unwarranted assumption that a court of equity, to afford relief, will make and enforce a new, valid, and unobjectionable contract, because it cannot enforce the invalid one, which in their ignorance of the law the parties themselves had actually made. It also assumes that the appellant may allege one contract, prove another, and secure an enforcement of the one alleged, because the one proven is invalid as against public policy, and unenforceable. The evidence produced upon the trial, in so far as it tends to sustain any contract whatever, discloses one for the conveyance of land after the appellant had himself obtained the legal

title, and the appellant is correct in his contention that this action is one for specific performance. If there were no other reason, the contract could not be specifically enforced, because no definite description of the particular forty acres to be conveyed has been proven or shown. In fact it is not fixed in the decree, but is to be hereafter determined. It is elementary that a contract for the sale or conveyance of a part only of a tract of land, which fails to designate the specific portion to be conveyed, is too indefinite to be the basis of decree for specific performance.

The judgment is reversed, and the cause remanded with instructions to dismiss the action.

RUDKIN, C. J., DUNBAR, MOUNT, and PARKER, JJ., concur.

[No. 8392. Department One. November 30, 1909.]

WILLIAM R. HAWKES, *Respondent*, v. DAVID M. HOFFMAN
et al., *Appellants*.¹

APPEAL—REVIEW—HARMLESS ERROR. On a trial before the court without a jury, rulings at the trial are without prejudice where pertinent evidence was not rejected, Bal. Code, § 6535, requiring the supreme court to disregard technicalities and retry the case on the merits.

PARTY WALLS—COVENANTS RUNNING WITH LAND. An agreement to pay half the cost of a party wall, erected on the line, is in the nature of a covenant running with the land and binds successors in interest, with notice actual or constructive.

VENDOR AND PURCHASER—BONA FIDE PURCHASER—PARTY WALLS. The purchaser with notice of a party wall agreement, from a former purchaser without notice, may claim the immunity of his vendor.

PARTY WALLS—IMPLIED CONTRACT. The use of a party wall, constructed on the line by the adjoining owner, raises no implied obligation to pay one-half of its cost, an express contract being necessary.

PARTY WALLS—NOTICE OF AGREEMENT—BONA FIDE PURCHASER. Notice that a party wall was built upon a division line by the person

¹Reported in 105 Pac. 156.

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who owned the adjoining tract, and used by him, is not sufficient to put a purchaser upon inquiry as to an unrecorded party wall agreement which charged the land purchased with one-half the cost of the wall.

Appeal from a judgment of the superior court for Pierce county, Shackleford, J., entered August 17, 1909, upon findings in favor of the plaintiff, in an action upon a party wall agreement, after a trial before the court without a jury. Reversed.

Theo. D. Powell, for appellants.

Johnston & Swindells, for respondent.

FULLERTON, J.—On May 20, 1890, the respondent owned lot 20, in block 1104, in the city of Tacoma, and the Tacoma Land Company, a corporation, owned the adjoining lot, numbered 21, in the same block. The parties on that day entered into an agreement in writing, duly acknowledged, by the terms of which the respondent agreed to erect a party wall, according to certain specified dimensions and out of certain specified materials, one-half upon his own lot and one-half upon the lot of the Tacoma Land Company. The agreement contained the following clauses:

“Third. The party of the first part [the respondent in this action] shall furnish and provide all other materials for and shall construct said wall and shall keep a true account of the cost thereof, and before the party of the second part, its successors or assigns, shall use said wall or any part thereof it or they shall first pay to the party of the first part therefor for each story of said wall or any part thereof purposed to be used as follows: *Provided, however*, that if the party of the second part, its successors or assigns, shall use only a part of a story it or they shall pay for the whole of said story:

“For the first story one-half of what it would cost to build a lawful party wall and foundation to sustain a one-story building at the rate paid by the party of the first part for labor and materials used in and upon said wall.

"For the second story one-half of what it would cost to build a lawful party wall and foundation to sustain a two-story building at the rates paid by the party of the first part for labor and materials used in and upon said wall.

"For the third story one-half of what it would cost to build a lawful party wall and foundation to sustain a three-story building at the rates paid by the party of the first part for labor and materials used in and upon said wall.

"For the fourth story one-half of the whole cost of said wall.

"It being expressly understood and agreed that in no event shall the party of the second part be liable under the terms of this agreement to pay for more than one-half of the entire cost of said wall, or for more than one-half of what it would cost at the rate paid by the party of the first part for labor and material used in and upon said wall to build a lawful party wall and foundation to sustain a building of the height the party of the second part may from time to time erect.

"Ninth. The benefits and burdens of the covenants herein contained shall annex to and run with the land herein described so long as said wall continues to exist and shall bind the respective heirs, legal representatives and assigns of the respective parties hereto."

Acting pursuant to the agreement, the respondent, in the year 1890, erected a four story party wall in accordance with the stipulations therein contained, one-half upon his own property and one-half upon that of his co-contractor, at a cost of three thousand two hundred sixty-one dollars and thirty-three cents, all of which he duly paid. The agreement was not recorded in the record of deeds of Pierce county until February 13, 1909.

After the execution of the agreement and the erection of the party wall, but prior to the time the agreement was recorded, the Tacoma Land Company mortgaged its lot to the Provident Life & Trust Company, without referring in any way to the agreement. This mortgage was foreclosed and the property sold by the sheriff of Pierce county under the decree of foreclosure to the Tacoma Land & Improvement

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Company, which company afterwards received a sheriff's deed therefor. The Tacoma Land & Improvement Company conveyed by warranty deed to one George L. Dickson, who in turn conveyed by a similar deed to the present appellants. Each of the deeds last mentioned were executed and delivered prior to the time the party wall agreement was recorded, and neither of them contained any reference thereto. Neither the Provident Life & Trust Company, at the time it took its mortgage upon the lot, nor the Tacoma Land & Improvement Company nor George L. Dickson, at the time of their several purchases, had any notice or knowledge of the existence of the party wall agreement other than such as is necessarily inferred from the fact of the existence of the party wall, and that one-half thereof stood upon the property purchased by them. The appellants, however, at the time they purchased, had full knowledge of the party wall agreement and of all its terms and conditions.

After their purchase, the appellants erected a four-story building upon lot twenty-one, using the party wall as one of the walls of the new building. Thereafter the respondent brought the present action to recover from them one-half the original cost of the wall. The trial court held that he was entitled to recover, and entered judgment accordingly. This appeal was taken therefrom.

During the progress of the cause in the court below, the appellants took many exceptions to the rulings of the court relating chiefly to questions of practice. These are urged upon us here, but we find it unnecessary to discuss them in detail. Even were the rulings of the court in every instance not technically correct, no prejudice resulted to the appellants thereby. No evidence was admitted that was not admissible under the actual issues between the parties, and none was rejected pertinent thereto. The cause is here on its merits, and in such cases this court is required by statute to hear it on its merits, disregarding any technical defect which has not

operated to the prejudice of the party complaining. Bal. Code, § 6535 (P. C. § 1083).

Passing then to the merits of the controversy, the appellants first contend that the party wall agreement is a personal covenant, not one running with the land; that their particular grantor, who entered into the agreement personally, may be bound thereby, but subsequent purchasers with or without notice are not so bound. This, however, is no longer an open question in this state. In *Hoffman v. Dickson*, 47 Wash. 431, 92 Pac. 272, 93 Pac. 523, where this very agreement was under consideration, it was held that an agreement of this character was in the nature of a covenant running with the land, and was binding upon the grantees of the respective parties. The conclusion there reached was subsequently approved in the case of *Sandberg v. Rowland*, 51 Wash. 7, 97 Pac. 1087, where it is said:

“On the subject of the payment of the expense of the construction of a party wall, the decisions of the courts have not been uniform. On the contrary, there has been an irreconcilable conflict. In New York and Illinois it has been uniformly decided that the payment for a party wall is in no way connected with the land, and that the covenants in regard to the payment of the same or for its use cannot be construed to run with the land. But these are extreme cases, the logic of which does not seem to have appealed to courts generally. In other jurisdictions it has been determined that the right to that portion of a party wall resting on the lot of an adjoining owner is not personal to the owner of the lot on which the building is erected, but one running with the land, and that therefore a conveyance of the lot on which the building is erected passes to the grantee the right to recover of the adjacent owner the value of one-half of the wall when used by him.”

We are satisfied with these holdings, and, if the question be not in fact *res judicata*, we have no desire to depart therefrom.

The right of the appellants to claim the immunity of purchasers without notice cannot of course be questioned. Al-

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though they had actual notice themselves of the existence of the party wall agreement it is conceded that their grantor had no such notice, and the rule is that a purchaser with notice from a purchaser without notice may claim any immunity his grantor has because of the fact. "The reason is to prevent a stagnation of property, and because the first purchaser, being entitled to hold and enjoy, must be equally entitled to sell." Chancellor Kent in *Bumpus v. Platner*, 1 Johns. Ch. 213. See, also, *Stanley v. Schwalby*, 162 U. S. 255, 16 Sup. Ct. 754, 40 L. Ed. 960, 2 Warvelle, Vendors, p. 606.

Nor can it be successfully denied that the appellants, in order to be charged with liability for the costs of the wall, must have had notice, either actual or constructive, of the covenant obligating their grantor to pay. The rule is general that where the owner of a lot erects a wall on the boundary line between his own and the abutting lot, resting partly upon each, no implied obligation is imposed on the owner of the abutting lot to contribute to the cost of the wall upon making use of it. Such an obligation is not implied in law. To exist at all it must be created by specific contract. See note to *Dunscomb v. Randolph*, 89 Am. St. 915 (107 Tenn. 89, 64 S. W. 21). It must follow therefrom that one buying without notice of the agreement stands in the position of all innocent purchasers for value; he takes the property without the incumbrance.

The principal question, therefore, is, Are the appellants purchasers with notice? It is conceded that the only notice their immediate grantors had is such as was implied from the fact that the party wall was erected on the dividing line of the lots, and that the owner of the abutting property was making use of the wall to support a building upon his property. This undoubtedly was notice that the wall might be there of right, and that the appellants as purchasers would have no legal warrant to require the removal of the wall as an unwarranted trespass upon their property. But it seems

to us that it would be going too far to say that it was notice of anything more. While it is a general rule that one who has notice of acts sufficient to put him upon inquiry is deemed to have notice of all facts which reasonable inquiry would disclose, the rule does not impute notice of every conceivable fact, however remote, that could be learned from inquiry; it imputes notice only of those facts that are naturally and reasonably connected with the fact known, and of which the known fact can be said to furnish a clue. In the language of Judge Wright in *Birdsall v. Russell*, 29 N. Y. 220:

“The rights of a purchaser are not to be affected by constructive notice, unless it clearly appears that the inquiry suggested by the facts disclosed at the time of the purchase would, if fairly pursued, result in the discovery of the defect existing but hidden at the time. There must appear to be, in the nature of the case, such a connection between the facts discovered and the further fact to be discovered, that the former may be said to furnish a clue—a reasonable and natural clue—to the latter.”

Furthermore, as we have said in discussing another question, no legal obligation to contribute to the cost of a party wall erected on the boundary of his land by the adjacent owner is imposed upon one who merely makes use of the wall; such an obligation must arise out of contract. It is also the rule that, if one of the owners of a party wall desires to erect a new wall of more extensive dimensions upon the site of the old wall, he cannot compel his co-owner to share the expense with him, in the absence of an express contract to that effect, and if an existing party wall is destroyed by fire, lapse of time, or otherwise, in the absence of a contract requiring the owner to rebuild, the easement is at an end, and there is no obligation resting upon either party to rebuild. *Hoffman v. Kuhn*, 57 Miss. 746, 34 Am. Rep. 491; *Antomarchi's Executor v. Russell*, 63 Ala. 356, 35 Am. Rep. 40; *Sherred v. Cisco*, 4 Sand. 480.

Again, the erection of a party wall is as much usually for

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economy in the matter of space as it is for economy in the matter of cost, and contracts are not unusual where the owner of a lot has agreed with the owner of an adjoining lot to erect at his own cost a party wall one-half upon the land of each, and allow the adjoining owner to use the same without contributing to its cost, merely for the sake of the additional space the privilege would give him for his own building. Such, for instance, was the nature of the agreement in the case of *Huck v. Flentye*, 80 Ill. 258, and other instances in the books can also be found. The foregoing considerations, we think, lead to the conclusion that knowledge by an intending purchaser that a wall has been erected on the dividing line of the land he intends purchasing and the land of an adjacent owner is not notice to him that he must contribute to the expense of constructing the division wall in case he made use of it. Such a deduction is too remote from the fact known to legitimately follow therefrom, and the one fact furnishes no natural or reasonable clue to the existence of the other. And this being true the appellants in the present case must be considered to be purchasers without notice and not liable to contribute to the expense of constructing the wall in question.

But two cases have been called to our attention where this precise question has been decided. The first is from the supreme court of South Dakota. In that case the agreement had not been recorded, and it was conceded that the only notice the purchaser sought to be held had at the time of his purchase was the fact of the existence of the party wall. Discussing this question the court said:

"No case has been called to our attention, and we think none can be found, in which the existence of such a wall has been held to give constructive notice of the existence of an agreement binding the owner of an adjoining property to pay a portion of the expense incurred in the erection of such wall, and the only constructive notice that seems to have been recognized by the courts is that imparted by the recorda-

tion of the party-wall agreement." *Scottish-American Mortgage Co. v. Russell*, 20 S. D. 42, 104 N. W. 607.

The second case is from the supreme court of Missouri. This case is somewhat peculiar in the fact that the judge writing the opinion reached a conclusion that would require a different judgment from that pronounced by the court, but which was not followed because his colleagues did not concur in his reasoning. The facts were that Roach & Stitt entered into an agreement with one Elliott, by the terms of which they agreed to "place the walls of their building, now in the process of erection, six (6) inches on the lot now owned by the party of the second part [Elliott]; and the party of the second part further agrees that when he shall join said walls he will pay to the party of the first part one-half the cost of so much of said walls as he may join to." Roach & Stitt thereupon completed the wall and thereafter sold their lot to one Cheatham. Elliott conveyed his lot to Sharp, who had no notice of the contract between Roach & Stitt and Elliott other than such as existence of the wall might impart. Sharp after purchasing the lot erected a building thereon, using the party wall as one of the walls of his building. Cheatham thereupon brought an action to recover one-half the cost of the wall. He recovered in the court below, but the judgment was reversed on appeal for the reason that Sharp was a purchaser without notice. *Sharp v. Cheatham*, 88 Mo. 498.

There are other cases which, although they do not directly decide the question, recognize the principle that notice of a contract by which one lot owner agrees with another to pay a portion of the cost of a party wall erected by the other upon the division line of their property, as a condition precedent to using it, must be something more than the mere fact of the existence of the party wall. For example, in the case from Sanford's reports, above cited, at page 489, the judge arguing against the liability of one to pay for a party wall merely because he has made use of it, uses this language:

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"Then what is the effect of his using the party wall? He found it on his land, on taking possession. He wanted to build. Was he to tear it down, or insist on the plaintiff's removing the half wall, so that he could occupy his whole land? This he might have done (*Wigford v. Gill*, Cro. Eliz. 269), to her great injury, and with probably no advantage to himself. Or was he not entirely at liberty to use as his own, an erection on the land he had bought, without subjecting himself to pay for work done without his request or knowledge. We think he was. We do not see how the defendant is liable to pay for half of this wall, because he used it, any more than he would have been liable, if the Duryees had rebuilt before he bought, and had put their beams into the wall, without paying the plaintiff for it. Yet the proposition would be at once scouted, that the purchaser of a house in this city, having paid to the owner the price, in good faith and without notice, would be liable to the owner of an adjoining house, for the unpaid half of the cost of the party wall which separated the two tenements."

In *Kells v. Helm & Yerger*, 56 Miss. 700, the court speaking on the liability of a grantee to contribute towards the cost of a party wall erected under a contract with his grantor, used this language:

"If it be conceded that the appellant acquired a lien on the lot of Miazza, by virtue of the assignment by Cooper to him of the claim for one-half of the cost of the wall, it would not follow that this claim could be asserted against these defendants, who are purchasers, without notice, for a valuable consideration, or hold under the Greens, who were such. The agreement between Cooper and Miazza was never recorded; and it is admitted that the Greens had no actual knowledge of the claim arising out of it, and now set up by the appellant. That they knew, when they advanced their money and took the deed in trust, that Cooper had built the wall, and that afterwards Miazza had used it as one of the walls of his building, would not constitute notice; for it was not shown that they knew that Miazza did not contribute his share to the building of the wall in the first instance; and if it was so shown, they would have had the right to presume that Miazza had afterwards paid his share of the cost of the

wall, since he was not allowed by law to appropriate the wall to his use, without first making payment of one-half its cost or value."

So, in *Standish v. Lawrence*, 111 Mass. 111, the court rests its judgment, holding a grantee liable to contribute to the cost of a party wall erected on the line of his lot prior to the time of his purchase, on the fact that he had actual notice of the agreement of his grantor by which the liability to so contribute was created. To the same effect are *Wickersham v. Orr*, 9 Iowa 253, 74 Am. Dec. 348; *Ferguson v. Worrall*, 125 Ky. 618, 101 S. W. 966.

The grantors of the appellants were, therefore, purchasers without notice of the party wall contract, and as such could not be compelled to contribute towards the cost of the wall; and the appellants, as their grantees, partake of that immunity, and cannot themselves be held. The judgment appealed from is reversed and remanded with instructions to enter a judgment to the effect that the respondent, the plaintiff below, take nothing by his action, and that the appellants recover their costs.

RUDKIN, C. J., CHADWICK, MORRIS, and GOSE, JJ., concur.

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Opinion Per Goss, J.

[No. 8210. Department One. December 1, 1909.]

THE STATE OF WASHINGTON, *Respondent*, v. CLIFF
KINGHORN, *Appellant*.¹

CRIMINAL LAW—FORMER JEOPARDY—DISMISSAL AFTER JURY SWORN.
A plea of former jeopardy is properly sustained where the accused had been placed on trial before a court of competent jurisdiction on a sufficient indictment before a jury empaneled and sworn, when the charge was dismissed on motion of the state without his consent or any sufficient reason.

SAME—EXCUSE FOR DISMISSAL—TRIAL COMMENCED WITHOUT PLEA.
That the accused had been placed on trial before he had been arraigned or had pleaded is not ground for dismissal by the state without his consent, where he had thereafter entered a plea of not guilty, as an issue was formed which put him in jeopardy.

FULLERTON, J., dissents.

Appeal from a judgment of the superior court for Snohomish county, Black, J., entered December 21, 1908, upon a trial and conviction of rape. Reversed.

E. C. Dailey, for appellant.

Ralph C. Bell, for respondent.

Goss, J.—The appellant was tried, convicted, and sentenced upon an information charging him with having committed statutory rape. After the jury had been impaneled and sworn to try the case, and the state had sworn the prosecutrix as a witness and had commenced interrogating her, the appellant objected to the introduction of any further evidence, and moved to dismiss the case because he had not been arraigned and had not pleaded to the information. The motion having been denied, the appellant was arraigned under the order of the court, and entered a plea of not guilty. Thereupon, on the motion of the state, the jury was discharged, and an exception reserved by the appellant. Another jury was thereupon impaneled and sworn to try the

¹Reported in 105 Pac. 234.

case. The appeal is prosecuted from a judgment entered upon the verdict of the latter jury.

After the second jury had been impaneled and sworn, the appellant entered a further plea of former jeopardy. The constitution, art. 1, § 9, provides that no person shall be twice put in jeopardy for the same offense. The appellant contends that the judgment violates this provision of our constitution. There is a division of authority on the question as to when the period of jeopardy begins, but we think the better rule and the one supported by the decided weight of authority is that, when the accused has been placed upon trial in a court of competent jurisdiction on a sufficient indictment, before a jury legally impaneled and sworn, the constitutional peril has attached, and that a discharge of the jury without good cause and without the consent of the accused is equivalent to an acquittal.

“While there is no jury set apart and sworn for the case, the defendant has not been conducted to his jeopardy. But when, according to the better opinion, the jury is full, sworn, and added to the other branch of the court, and all the preliminary things of record are ready for the trial, the prisoner has reached the jeopardy from the repetition of which our constitutional guaranty protects him.” 1 Bishop, New Crim. Law, §1015.

“Though the jury has been impaneled and sworn, there is still no jeopardy, therefore no bar to second proceedings, unless the court is so clothed with authority and the prior proceedings are such that a judgment upon a verdict duly returned will be valid.” Id. § 1020.

This view is recognized in *State v. Lee Doon*, 7 Wash. 308, 34 Pac. 1103, and in *State v. Hubbell*, 18 Wash. 482, 51 Pac. 1039, and by the following cases from other jurisdictions: *Lee v. State*, 26 Ark. 260, 7 Am. Rep. 611; *State v. Walker*, 26 Ind. 346; *People v. Barret*, 2 Caines (N. Y.) 100; *Commonwealth v. Cook*, 6 Serg. & Rawle (Pa.) 577, 9 Am. Dec. 465; *Mount v. State*, 14 Ohio 295, 45 Am. Dec. 542.

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The other view, that jeopardy begins only after verdict is rendered, is condemned by Bishop as unsound in principle. He declares that the effect of such a holding is to make the constitution read that no man shall be twice "tried" for the same offense, thus confounding the danger or jeopardy of the thing and the thing itself. 1 Bishop, New. Crim. Law, §1018.

We next inquire whether there was good cause for discharging the jury. Had anything then occurred or been omitted which would have rendered a judgment erroneous on a verdict of guilty? We think not. When the appellant had been arraigned and pleaded not guilty, an issue was joined and the trial should have proceeded. *State v. Horine*, 70 Kan. 256, 78 Pac. 411; *Weaver v. State*, 83 Ind. 289; *Disney v. Commonwealth*, 9 Ky. Law 413, 5 S. W. 360; *State v. Weber*, 22 Mo. 321; *State v. Williard*, 39 Mo. App. 58; *Morris v. State*, 30 Tex. App. 95, 16 S. W. 757. In *State v. Straub*, 16 Wash. 111, 47 Pac. 227, we held that the failure to plead in a capital case could not be raised for the first time on appeal; that the omission was technical, and did not affect any substantial right of the accused. Applying the logic of that case to the case at bar, it will at once appear that, when the plea was entered, the irregularity was cured, and the trial should have proceeded in an orderly way before the jury then impaneled.

It follows from what we have said that the plea of former jeopardy should have been sustained and the appellant discharged. It was stated in oral argument by counsel for the appellant, and not denied by state's counsel, that the appellant and the prosecutrix have married and are now living together as husband and wife. This fact makes us less reluctant to adopt the view we have announced. The judgment will be reversed with directions to discharge the appellant.

RUDKIN, C. J., CHADWICK, and MORRIS, JJ., concur.

FULLERTON, J. (dissenting)—I am unable to concur in the holding that the defendant was in jeopardy by virtue of the proceedings had prior to the time he entered his plea, and I therefore dissent from the judgment pronounced by the majority.

[No. 8276. Department One. December 1, 1909.]

SAMUEL SALHINGER, *Appellant*, v. HENRY SALHINGER
et al., *Respondents*.¹

PARTNERSHIP—RIGHTS OF PARTNERS—FRAUD. A copartnership raises a strong fiduciary relation, requiring the utmost good faith and rendering a partner liable for false representations or concealment in securing a partnership settlement.

PARTNERSHIP—SETTLEMENT—FRAUD. A partnership settlement should be set aside for fraud where the parties to the action were brothers and partners, the plaintiff was in ill health and weak-minded and subject to the defendant's influence, and the defendant, who had been in active charge of the partnership, the property of which was of the value of sixty thousand dollars, represented it as valueless and the business without profit and thereby, and by his influence over the plaintiff, who relied on the statements, fraudulently secured the settlement with the plaintiff for a small sum; as such statements are representations of material facts, relied upon by the plaintiff to his injury.

Appeal from an order of the superior court for Snohomish county, Black, J., entered February 6, 1909, upon sustaining a demurrer to a petition to vacate a judgment. Reversed.

Tom Alderson and Thos. F. Murphine, for appellant.

Brownell & Coleman, for respondents.

MORRIS, J.—It is sought in this proceeding to vacate a judgment upon the ground of fraud. A general demurrer to the petition was sustained in the court below, and appellant electing to stand upon the petition, judgment of dismissal was entered, and the appeal follows.

¹Reported in 105 Pac. 236.

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Samuel and Henry Salhinger are brothers, Sarah is the wife of Henry, and The Salhinger Company is a corporation in which Henry Salhinger and his wife are the sole stockholders. The petition sets forth that in the year 1888, Samuel and Henry Salhinger entered into a copartnership at Chicago, under the firm name of S. & H. Salhinger; that subsequently the business was removed to Washington, and was conducted here in various cities until the fall of 1892, when it was established at Everett, and placed under the management of Henry Salhinger. In 1894, Samuel Salhinger located at San Francisco, where he has since resided, acting as a buyer for the firm until the fall of 1899, when Henry Salhinger, without his consent, excluded him from any part in the business, and refused to make him any compensation for his interest therein. Samuel made repeated demands upon Henry, both by letter and in person, for a settlement of the partnership business and a recognition of his rights therein, all of which were denied and refused. In August, 1907, Henry organized The Salhinger Company, and transferred all of the partnership assets thereto, with intent to cheat and defraud the appellant and deprive him of his interest in such assets.

In October, 1907, this action was commenced, the complaint reciting the above facts as a basis for relief, and praying for a dissolution of the copartnership, an accounting, and other equitable relief. The petition and certain affidavits, which are made a part thereof for the purpose of making a *prima facie* showing that appellant was entitled to the relief prayed for, then recite that, when Henry was served with the summons, he caused his wife to telegraph to appellant that he was very ill and requesting appellant to come to Everett and see him, but that three days thereafter he appeared at San Francisco in seeming good health, and began to negotiate with appellant for a settlement of their differences; that for the past ten years appellant has been in poor health, weak-minded, and unable to do any business without

the advice and guidance of his friends; that he was particularly subject to the influence of Henry; and that Henry, knowing these facts and for the purpose of easily overreaching and defrauding him, obtained an interview with appellant, and taking him away from the companionship of his friends and advisers, kept him under his control for two days, during which time he obtained a settlement and discharge of all claims made by appellant in his complaint for a dissolution and accounting. This release was also signed by the wife of Samuel, who sets forth that she had no knowledge of the business nor of its then condition, having been married to Samuel after his removal to San Francisco. The consideration of this release was \$50, and there was executed at the same time a paper, signed by Henry, as follows: "Everett 10, 9, 1907. On December 1st I agree to pay to Samuel Salhinger \$25 each month." Henry was then at San Francisco, and it is asserted that the dating of this last writing at Everett was a part of Henry's scheme to cheat and defraud appellant and to enable him to better escape the payment of the amount called for. Upon Henry's obtaining this release, he returned to Everett, and on October 16, 1907, his attorneys made a motion to dismiss the action, based upon the written release and discharge executed by appellant, which motion was granted on the 24th day of October, 1907. On May 29, 1908, appellant filed his petition to vacate this judgment of dismissal, in which he recited many of the facts above set forth, and on January 30, 1909, he filed an amended petition, supported by affidavits from acquaintances and relatives, in which is set forth his weakened mental and physical condition, his susceptibility to influence, and other matters above referred to. In addition, he says that Henry assured him, at the time of the execution of the discharge, that the business was unremunerative, yielding only a living to Henry, and that the continuation of the lawsuit would mean the ruination of the business and of Henry's financial standing and credit, and would result in no good to appellant; that be-

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lieving all of Henry's statements and representations to be true, and that he had been misinformed as to the real facts when he commenced his action, and relying upon Henry's assertion of his honesty and good faith, his weakened physical and mental condition rendering him easily persuaded, his scruples and doubts of his brother's treatment of him were overcome and he signed the discharge. The petition sets forth the value of the partnership property as the sum of \$60,000. It also averred that none of the monthly payments of \$25 have been paid. It has been necessary to set forth so much of the petition to properly discuss the alleged error in the sustaining of the demurrer, inasmuch as the demurrer went to the entire petition.

The requirement of the statute, where a plaintiff seeks to vacate a judgment, is that such vacation be not had until it is adjudged "that there is a valid cause of action." If, then, the facts set forth in this petition, if true, entitle appellant to the relief therein sought, determined not as an exact, absolute finding, but only to the extent that they show *prima facie* the right to substantial relief, it was a sufficient showing as against a demurrer, and the court below should have so ruled. The facts alleged disclose that Samuel and Henry Salhinger were brothers and copartners, a two-fold fiduciary relation, the one resting in ethics, the other in law; and while the court need not in this particular case concern itself with the ethical relation, the legal one presents, to our mind, when viewed with its attendant allegations, sufficient *prima facie* showing to render it good as against a demurrer. There is no stronger fiduciary relation known to the law than that of a copartnership, where one man's property and property rights are subject to a large extent to the control and administration of another.

"If fiduciary relation means anything, I cannot conceive a stronger case of fiduciary relation than that which exists between partners. Their mutual confidence is the life blood of the concern. It is because they trust one another that

they are partners in the first instance; it is because they continue to trust one another that the business goes on. These properties of partnership render it eminently a relation of trust. All its effects are held in trust, and each partner is, in one sense, a trustee for the newly created entity, the partnership, and for each member of the firm, who thus becomes a beneficiary under the trust." Parsons, Partnership (4th ed.), §158, and note 2.

In this relation is established the requirement of utmost good faith, and it follows that no partner may deceive his co-partners for his benefit and their injury, either by false representations or by concealment. It was, therefore, the duty of Henry Salhinger, in effecting a settlement with his brother, to disclose to him fully the condition of the partnership affairs, so that in determining the nature and terms of his settlement Samuel might be as fully apprised of the real facts and true condition as Henry himself. This, according to the petition, he did not do; rather is it charged he sought to conceal the true situation; and knowing his brother's physical and mental weakness, he kept him away from his friends and advisers, misrepresenting the true condition of the partnership business, asserting as a failure and profitless concern that which it is said in truth was prosperous and of the value of \$60,000. The advantage thus gained the law will not permit to be retained; for, as is said in *Roby v. Colehour*, 135 Ill. 300, 337, 25 N. E. 777, quoting Mr. Pomeroy:

"Whenever two persons stand in such a relation that, while it continues, confidence is necessarily reposed by one, and the influence which naturally grows out of that confidence is abused, or the influence is exerted to obtain an advantage at the expense of the confiding party, the person availing himself of his position will not be permitted to retain the advantage, although the transaction could not be impeached if no confidential relation had existed."

Mr. Pomeroy, in speaking of this rule, says:

"It is settled by an overwhelming weight of authority that the principle extends to every possible case in which a fidu-

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ciary relation exists *as a fact*, in which there is confidence reposed on one side, and the resulting superiority and influence on the other." 2 Pomeroy, Equity Jurisp. (3d. ed), §956.

In using the above language, Mr. Pomeroy is speaking of equitable interference, but the reason of the law and the law itself is the same, as applied to actions of this character, whether the right sought to be enforced springs from statutory or equitable authority. The demurrer confessed as true all facts well pleaded, and the facts set forth meet every essential element of fraud. The representations as to the value of the property at the time of obtaining the discharge were statements of material facts. Those statements, it is asserted, were made with intent to defraud, and were knowingly false; that appellant believed them to be true, and relying upon such belief signed the discharge; and that he was deceived to his injury.

Respondents argue that, at the time of the settlement, the complaint shows appellant had full knowledge of the condition of the partnership and of its value, but such contention ignores the allegations of the petition as to the circumstances under which the discharge was obtained, and how it is asserted that appellant's belief as to that condition was fraudulently overcome by the misrepresentations of respondent as to the real condition, and how, in confident reliance upon the true condition being shown him by his brother, appellant executed the discharge. It might well be added that, if appellant was too confiding in assuming that his brother would not deceive him, it is not for respondent, charged with a betrayal of that confidence, to reproach him with or take advantage of it. We are of the opinion that, reading into the petition the relation existing between these two brothers, the trust and confidence imposed by law, and the duty of full disclosure of the true financial condition of the partnership at the time of the settlement, the petition states *prima facie* grounds for the vacation of the judgment of dismissal, and the court below was in error in sustaining the demurrer.

The judgment is reversed, and the cause remanded with instructions to overrule the demurrer, and for further proceedings.

RUDKIN, C. J., GOSE, CHADWICK, and FULLERTON, JJ., concur.

[No. 8335. Department Two. December 2, 1909.]

THE STATE OF WASHINGTON, *on the Relation of R. Lee Purdin, Appellant*, v. B. A. GAULT, *Respondent*.¹

COURTS—POLICE JUSTICE—SELECTION FROM JUSTICE OF THE PEACE—STATUTES—CONSTRUCTION—"MAY" OR "MUST." Under Laws of 1903, p. 102, specifying as one of the officers of a town of the third class, to be appointed by the mayor, "a police justice, who may be one of the justices of the peace of the precinct," it is not required that one of such justices be appointed, from the fact that cities of the first class are limited to two justices of the peace, one of whom must be appointed as police justice, and that Laws 1890, page 196, also authorizes the selection of a police justice from the two justices of the peace in towns or cities; since "may" is not to be construed as "must" unless a duty is imposed making a permissive construction repugnant to the intent or leading to an absurdity.

Appeal from a judgment of the superior court for Kittitas county, Preble, J., entered March 6, 1909, in favor of the defendant, upon an agreed statement of facts, dismissing a proceeding in the nature of a *quo warranto*. Affirmed.

E. E. Wager and *Graves & McDaniels*, for appellant.

Hovey & Hale, for respondent.

DUNBAR, J.—In the year 1908 the relator R. Lee Purdin, being one of the duly elected justices of the peace in and for Ellensburg, in Kittitas county, which is a city of the third class, was designated and constituted police justice by appointment of the mayor, confirmed by the council. At the last general election, the relator, Purdin, and one W. W. Bonney were elected justices of the peace in and for said

¹Reported in 105 Pac. 242.

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precinct or city of Ellensburg. But in January, 1909, the mayor designated and appointed the defendant, B. A. Gault, as police justice. Gault was not, and did not claim to be, a justice of the peace. Thereupon the relator instituted this action. The cause was tried to the court, and judgment was rendered in favor of the defendant. This appeal is taken from that judgment.

This case presents the question whether, under the statute providing for the appointment by the mayor of a police justice in cities of the third class, any one other than one of the two justices of the peace regularly elected by the voters therein can be appointed to, or exercise the functions of, such office. Section 4 of chapter 113 of the Laws of 1903, page 202, provides as follows:

“The government of such town shall be vested in a mayor and council, to consist of five members, a clerk, a treasurer, a marshal who shall be *ex-officio* tax and license collector, a police justice who may be one of the justices of the peace of the *precinct* in which said town is situated; and such subordinate officers as are hereinafter provided for.”

It is the contention of the appellant that the statute contemplated the practice generally prevailing in the cities of the first class, which provides for the selection of the police justice from one of the justices of the peace elected; and it is argued that it is not to be presumed that the legislature, while limiting the number of justice courts in cities of the first class and confining the appointment of police justice to one of the justices of the peace regularly elected therein, should confer larger powers upon cities of the third class, by giving to the mayor of the smaller cities discretionary authority to enlarge the number of justice courts by appointing one or more police justices in addition to the justices of the peace regularly elected; and that a legislative construction has been placed upon this enactment in the Laws of 1890, page 196, § 138, which is to the effect that,

“There shall also be elected, as hereinafter specified, a po-

lice justice, or so many as the council may deem necessary. The justice or justices so elected may be selected from the justices of the peace duly elected under the laws of the state of Washington, and while acting in city or town matters may hold office for that purpose anywhere within the city or town. Such justices of the peace shall have jurisdiction over all offenses defined by any ordinance of the city or town, and all other actions brought to enforce or recover any penalty, forfeiture," etc. ;

the section again providing, further on, that "all civil or criminal proceedings before such justice of the peace," etc. Many other questions are discussed by the appellant in support of his contention that the word "may" in the statute should be construed as mandatory and equivalent to "must."

A justice of the peace is an officer provided for by the constitution, with jurisdiction prescribed by law under constitutional authority. The jurisdiction of a police justice is more limited, extending only to questions arising under the town or city ordinances. If the jurisdiction had been the same, there would have been no occasion for the legislature to make provision for the latter. It is true that § 138 of the Laws of 1890 refers to these officers as justices of the peace; but, as was well said by the learned judge who tried the case:

"The identity of two officers is determined, not by the name by which they may be called, but by the identity of their functions, and whatever the officer clothed only with the circumscribed jurisdiction conferred by § 138 may be called, he is not in fact a justice of the peace in the ordinary statutory and constitutional sense of that word, because he has not the jurisdiction of such justice of the peace."

Nor do we think that there is anything inconsistent with intelligent legislative intention in conferring power upon the council to appoint magistrates of this character beyond the number of justices of the peace provided for by law; for it cannot be said to be unwise to give this discretion to the city council, to be exercised for the best interests of the city, in

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view of all the existing conditions, both as to the qualifications of the justices of the peace elected, and the relative amount of business falling within the jurisdiction of the justice of the peace, or within the more limited jurisdiction of the police justices. We see no constitutional invasion by this construction. Nor does it militate against this construction that the legislature has adopted a different policy in regard to cities of the first class. In any event, it has seen fit to use the mandatory expression in one case and the permissive in the other. Section 2 of chapter 85, page 185, Laws 1899, the act relating to justices of the peace in cities of the first class, is as follows: "Within ten days after such election the mayor of the city shall appoint one of the justices so elected the police justice or police judge of such city." There would seem to be no good reason why the legislature should not have used the same language when legislating in regard to towns of the third class, if the intention had been to make it the duty of the mayor to appoint police justices from the justices elected.

The learned counsel says he will not enter into any dogmatic definitions of the words "may" and "must"; yet it seems to us that this is a matter which necessarily must be considered. The word "may," according to its original construction, is permissive and should receive that interpretation unless such a construction would be obviously repugnant to the intention of the legislature, to be collected from the terms of the act, or would lead to some other inconvenience or absurdity. *Medbury v. Swan*, 46 N. Y. 200.

"The question whether the word 'may' is to be construed as mandatory or discretionary has been much discussed, but the general rule is that the ordinary meaning of the word is that there is involved a discretion, and it is to be construed in a mandatory sense only where such construction is necessary to give effect to the clear policy and intention of the legislature; that where there is nothing in the connection or the language or in the sense or policy of the provision to require an unusual interpretation, it will be given its ordi-

nary meaning; and that where, by the use in other provisions of the statute of mandatory words, it appears that the legislature intended to distinguish between these words and "may," "may" will not be construed as imperative." 5 Words & Phrases, 4420.

And this is the universal rule. The word "may," in every act imposing a duty means "shall." So it is held, under acts 1868-69 providing that, when the personal estate of a decedent is insufficient to pay debts, etc., the executor or administrator may apply to the superior court by petition to sell the decedent's real property for the payment of debts, the word "may" means "must." *Pelletier v. Saunders*, 67 N. C. 261. But in this case, of course, no imperative duty is resting upon the council compelling them to appoint from the justices of the peace, and the common-sense meaning of the word must therefore obtain, and the intention of the legislature must be presumed to have been to confer discretion on the mayor in this respect.

This presumption, we think, has not been overcome by any avowed policy of the legislature affecting officers of this kind, and the judgment of the lower court will therefore be affirmed.

RUDKIN, C. J., CROW, MOUNT, and PARKER, JJ., concur.

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Statement of Case.

[No. 8154. Department Two. December 2, 1909.]

A. C. CHANNEY, *Respondent*, v. ELIZABETH CHANNEY,
Appellant.¹

APPEAL—NOTICE—CERTAINTY. An appeal from a final order dismissing a petition to vacate a judgment will not be dismissed because of uncertainty in references in the notice of the appeal to previous orders in the proceeding.

APPEAL—RECORD—AFFIDAVITS. Affidavits attached to and made a part of a petition to vacate a judgment are properly part of the transcript on appeal, without being brought up by a statement of facts, when they were not used or brought up as evidence.

DIVORCE—VACATION—GROUNDS—JURISDICTION. Under Bal. Code, § 5153, subdiv. 4, the superior court has jurisdiction to vacate a decree of divorce procured by fraud, regardless of whether the service was personal or by publication; although Bal. Code, § 4880, authorizing the opening of default judgments for the purpose of defending the action within one year, when secured on service by publication, expressly excepts judgments for divorce.

SAME—PETITION—SUFFICIENCY. A petition to vacate a decree of divorce on the ground of fraud, filed in the action, is not demurrable for failure to set out the decree, where it leaves no uncertainty as to the nature of the decree, the grounds therefor, the parties, court, and date.

SAME—FRAUD. Fraud, warranting the vacation of a decree of divorce, is shown by a petition alleging that a husband sent his wife cash, promising to join her, and three months later commenced an action for divorce, securing service by publication and mailing to a wrong address, at the same time writing her many letters and keeping her in ignorance of the action, of which she had no notice until after the decree.

Appeal from orders of the superior court for King county, Tallman, J., entered February 6, 1909, upon sustaining a demurrer, dismissing a petition to vacate a decree. Reversed.

Willetts, Oleson & Willett and *Benj. M. Levine*, for appellant.

Fred C. Brown, for respondent.

¹Reported in 105 Pac. 229.

PARKER, J.—This is an appeal from orders of the superior court sustaining respondent's general demurrer to and dismissing appellant's petition, upon her refusal to plead further, wherein she seeks to have vacated a decree of divorce, rendered against her in this action, upon the ground of fraud in obtaining the same. The petition is entitled and filed in the original action, and the allegations thereof which we deem necessary to notice, are as follows:

"That on May 29, 1908, plaintiff commenced the above entitled action for divorce against this defendant, charging this defendant with being guilty of cruelty and personal indignities toward the plaintiff, rendering his life burdensome, and that this defendant struck plaintiff, and that she has a violent and ungovernable temper, and other allegations as appear in the complaint in this action.

"That on May 28, 1908, plaintiff herein made an affidavit in words and figures as follows, to wit: 'A. C. Chaney being first duly sworn, on oath deposes and says: . . . that the defendant is a resident of No. 3203 Prairie Avenue, Chicago, Illinois; that plaintiff has deposited at the United States Post Office, at Seattle, Washington, an exact copy of the original summons and complaint herein, in a sealed envelope, with postage prepaid, and addressed to the defendant at No. 3203 Prairie Avenue, Chicago, Illinois. This affidavit is made in support of the plaintiff's motion for an order for the service of the summons by publication of the summons herein.'

"That on the said affidavit the court in this case entered an order granting leave to publish summons, in words and figures as follows, to wit: [Here follows the order.]

"That thereupon the plaintiff in this case proceeded to serve the defendant, this petitioner, with summons by publication, and that he published a summons for seven consecutive weeks, commencing May 29, 1908, and ending July 10, 1908, and that the said summons was in words and figures as follows, to wit: [Here follows copy of the summons which appears to be in due form.]

"That thereafter such proceedings were had in said cause that an order of default was entered herein on July 29, 1908.

"That thereafter this action came on to be heard on August 4, 1908, before the Honorable Arthur E. Griffin, one of

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the judges of the above entitled court, as an undefended divorce case, and that at said action plaintiff gave evidence in support of the allegations of his complaint, but that the defendant was not present, and was not represented in said action, and had no knowledge that such a hearing was being held.

"That thereupon the court on August 4, 1908, made and entered findings of fact and conclusions of law and decree, granting to the plaintiff in this action a divorce from the defendant, on the grounds of cruelty and personal indignities.

"That said divorce was procured by the plaintiff herein by fraud, in this, to wit, . . . That from May 2, 1900, to February 29, 1908, this plaintiff and defendant lived and cohabited together as husband and wife, and that on Feb. 29, 1908, with the plaintiff's knowledge and consent, and under his direction, this defendant bade the plaintiff goodbye for Chicago, at the railway station at Everett, Washington, at which time the plaintiff told this defendant that he intended to sell out his tea and coffee routes in Seattle, Washington, in a few days, after which he would immediately go east, and either call or send for this defendant to resume housekeeping and living together in some eastern city, and that he would also send this defendant money for her support and maintenance; that since said Feb. 29, 1908, plaintiff has sent this defendant five small remittances, totaling \$17, and that between Feb. 29, 1908, and August 1, 1908, the defendant has received from the plaintiff thirty-seven letters, in none of which did he mention in any way the matter of divorce; that this defendant had no notice of any kind direct, or indirect, that suit for divorce had been instituted or was pending in this court, or elsewhere, or that any such action was contemplated, until Saturday, August 29, 1908, when she received through the mails, a copy of the Seattle Daily Bulletin dated August 5, and from which she discovered that a decree of divorce had been granted herein to plaintiff in this action, whereupon she at once consulted an attorney, and on Sept. 25, 1908, she received copies of the papers in this cause, which was the first complete information of this action that ever came to her attention.

"This defendant further alleges that she never received any summons and complaint herein, or any notice of any kind, and had no knowledge whatever that a copy of the

summons and complaint herein was mailed to her, and further states that she has not resided at No. 3203, Prairie Avenue, Chicago, Illinois, since the first day of June, 1908, on which date she left said address for No. 3218 Calumet Avenue, Chicago, Illinois, where she resided until June 29, 1908, when she went to reside at her present address, No. 3358, Prairie Avenue, Chicago, Illinois, and where she now resides with Maurice Chaney, a brother of the plaintiff herein, and his wife and family; and that the plaintiff herein was kept informed continuously of the correct address of this defendant, and knew of the changes in location made by this defendant.

"That defendant further states that she has made diligent inquiry at No. 3203, Prairie Avenue, and at the Chicago Post Office since the said 25th day of September, 1908, for the said copy of summons and complaint, and has obtained no information that said summons and complaint was ever at said address or in the City of Chicago; and affiant alleges and believes that no such summons and complaint was ever mailed to her, and that none was ever delivered to any address in the city of Chicago, and that during the time the said summons was published, the plaintiff and defendant were corresponding, and defendant was receiving from plaintiff letters correctly addressed to her respective street numbers."

There are other allegations which we think are sufficient to constitute a defense upon the merits. This petition is verified by one of petitioner's attorneys on account of her nonresidence and absence from the state. There are attached to the petition, and made part thereof, affidavits signed by the petitioner herself, wherein are stated substantially the same facts alleged in the formal part of the petition, except the facts shown by the record and files in the case leading up to the rendering of the decree of divorce. The prayer is that the decree be vacated and she be granted an opportunity to defend the action. This petition was filed November 19, 1908, only a little more than three months after the rendering of the decree, which in the light of the allegations render it plain she moved promptly.

Counsel for appellant moves to dismiss the appeal because of certain technical defects in the record and notice of appeal,

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whereby it becomes uncertain as to whether it was an original or amended petition to which the demurrer was sustained when appellant elected to stand upon her petition. In the notice of appeal it is stated, among other things, that the appeal is taken from the order sustaining the demurrer to the "amended petition"; and counsel argues that the record fails to show any such petition or order. It is plain, however, from the record and final order of dismissal, that a general demurrer to "a petition," which we must presume is the one we find in the record, was sustained and the appellant thereupon elected to stand upon her petition, and for that reason the proceeding was finally dismissed. The notice further plainly states that the appeal is taken from this final order, so the apparent erroneous reference in the notice to previous orders, which were not final, is immaterial. The motion to dismiss is denied.

Counsel moved to strike from the transcript the affidavits of appellant attached to her petition, resting the motion upon the decision of this court in *Whidby Land & Development Co. v. Nye*, 5 Wash. 301, 31 Pac. 752. If this case were brought here for review upon the merits, and these affidavits were attempted to be used as a part of the evidence without being made part of the record by bill of exceptions or statement of fact, as seems to have been attempted in that case, there would be merit in this motion. But these affidavits are attached to and made part of the petition, they constitute a part of the petitioner's statement of her cause of action, and the statements therein made cannot be stricken any more than statements in the body of the petition can be, and only for similar cause.

We are next confronted with the question of the jurisdiction of the superior court, in the light of Bal. Code, § 4880 (P. C. § 338), and the case of *Metler v. Metler*, 32 Wash. 494, 73 Pac. 535, construing that section, upon the authority of which, it is stated in appellant's brief, the learned trial court disposed of this proceeding. Sections 4878 and 4879

(P. C. §§ 336, 337), relate to the manner of serving summons by publication, the latter providing that, "Personal service on the defendant out of the state shall be equivalent to service by publication." It is then provided by § 4880:

"If the summons is not served personally on the defendant in the cases provided in the last two sections, he or his representatives, on application and sufficient cause shown, at any time before judgment, shall be allowed to defend the action and, except in an action for divorce, the defendant or his representative may in like manner be allowed to defend after judgment, and within one year after the rendition of such judgment, on such terms as may be just."

Commenting upon this section in the *Metler* case, the court said:

"It is evident that it was the intention of the legislature by this section to limit the right of a defendant to defend in an action for divorce to a time prior to the entry of the judgment, while it continued the right to defendants in other actions for a period of one year after that time. This means that the trial court has no control over an action for divorce after it has once rendered a decree therein; that while it may vacate judgments in other actions, for good cause shown, if application be made to it within one year, it has no such power over a judgment rendered in an action for divorce. The court can, of course, lawfully vacate such a decree when entered without jurisdiction, and perhaps where it is the result of fraud practiced on the court or the other spouse, but for reasons which ordinarily call for the exercise of a mere judicial discretion it has no such power."

While the court there fully recognized that this section gave to the superior court power to open a cause to let in a defense after judgment, where the service had been by publication, and withheld such power as to divorce decrees, it seems plain to us there was no intention of holding that fraud in obtaining a divorce decree could not be shown as a ground for its vacation. Indeed, the language of the opinion seems to assume to the contrary, though that question does not appear to have been in that case. It will be noticed that this

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section relates only to judgments and decrees rendered upon service by publication, its purpose evidently being to give to parties having judgments and decrees rendered against them upon such service, other than in divorce cases, an opportunity to appear and defend at any time within one year thereafter, when they can show any sufficient cause within the discretion of the court rendering such judgment or decree. Fraud would of course be one good cause, but there might be many other causes, sufficient under this section, which would not be if there were no such provision. It did not take away any rights possessed by parties having judgments rendered against them, but gave additional rights to parties having judgments rendered against them upon service by publication. In the absence of this provision, a judgment rendered upon service by publication could not be set aside for any different reason than could other judgments. This section is not the whole law upon the subject of setting aside divorce decrees, simply because such decrees are excluded from its operation. *Graham v. Graham*, 54 Wash. 70, 102 Pac. 891.

This petitioner does not have, nor does she seem to be claiming, any greater rights because the fraud which she alleges was perpetrated upon her was in a cause where the decree purports to have been rendered upon service by publication instead of some other kind of service. The effect of the fraud upon her rights is in no way controlled by the kind of service purported to have been made. And we do not think this petition shows want of jurisdiction in the superior court simply because it may allege a cause for vacating the decree under this section if it were not a divorce decree. It also may show facts constituting fraud sufficient for vacating the decree independent of this section, and this brings us to that question.

The general law relating to the vacation of judgments, being sections 5153-5162 of Ballinger's Code (P. C. §§ 1033-1042), among other things, provides:

“Sec. 5153. The superior court in which a judgment has been rendered, or by which or the judge of which a final order has been made, shall have power, after the term (time) at which such judgment or order was made, to vacate or modify such judgment or order:

“4. For fraud practiced by the successful party in obtaining the judgment or order.

“Sec. 5156. The proceedings to obtain the benefit of subdivisions two, three, four, five, six and seven of section 5153 shall be by petition verified by affidavit, setting forth the judgment or order, the facts or errors constituting a cause to vacate or modify it, and if the party is a defendant, the facts constituting a defense to the action;”

It is contended that this petition fails to set forth the decree which is sought to be vacated, and that the petition cannot be aided by the previous record in the cause, since the proceeding is in the nature of an independent action, as was suggested by this court in the case of *Roberts v. Shelton Southwestern R. Co.*, 21 Wash. 427, 58 Pac. 576, upon which counsel for respondent relies. We do not understand that decision to hold that the judgment or decree sought to be vacated must be set forth in the petition by a copy thereof, as seems to be the contention. An examination of that decision will show a total failure to set out the judgment sought to be vacated. At page 435, the court said:

“Now it will be observed that the petition in this instance fails entirely to set forth the judgment and decree complained of, or, except by inference, that any judgment or decree in which the appellant was interested was rendered at all.”

It cannot be said there is any such uncertainty in the setting out of the judgment in this petition. A petition in this kind of a proceeding is simply the statement of the petitioner's cause of action, as if it were a complaint, in which it becomes necessary to set forth the judgment sought to be vacated. We are unable to see why, in such a pleading, the decree sought to be vacated should be set forth with any

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greater certainty than when necessary to plead it in an ordinary civil action. The allegations of this petition leaves no uncertainty as to the nature of the decree, the grounds upon which it was rendered, the party in whose favor and the party against whom it was rendered, the court in which it was rendered, and the date on which it was rendered. The authorities seem to be uniform to the effect that nothing more is required. 2 Black, Judgments (2d ed.), 964; 11 Ency. Plead. & Prac., p. 1126.

Are the allegations of fraud in this petition sufficient to constitute a cause for the relief prayed for? That is, are they sufficient in law to entitle the petitioner to offer proof in support thereof. A brief summary of the main facts alleged may be stated as follows: The petitioner by the direction and consent of plaintiff went from this state to Chicago, February 29, 1908, with the mutual understanding that he would join her, and they would resume housekeeping in some eastern city. The divorce proceeding was commenced May 29, only three months later, by the publication of a summons in which a decree was rendered August 4, 1908. The petitioner never learned of or had any intimation of the pendency of the action or rendering of the decree until August 29, 1908. She never received any copy of the summons or complaint through the mail although, from the time she went away, up until August 29, she received from respondent thirty-seven letters, a large number of which were written after the action was commenced, among them being letters dated May 21, May 25, June 3, 9, 14, and 19, 1908. It will be noticed that respondent's affidavit of mailing the summons and complaint was May 28, yet they were not received by her, notwithstanding she received these numerous letters sent her very near the same time, both before and after. After alleging these and other circumstances indicating that she was fraudulently prevented from making her defense, she says in her petition that she "alleges and believes that such

summons and complaint was never mailed to her." It seems to us these allegations constitute sufficient pleading of a cause for the relief for which the petitioner prays. We are of the opinion that the sustaining of the demurrer to the petition and dismissal thereof by the learned trial court was erroneous. The orders appealed from are therefore reversed, and the cause remanded with direction to overrule the demurrer to the petition.

RUDKIN, C. J., DUNBAR, CROW, and MOUNT, JJ., concur.

[No. 8266. Department Two. December 2, 1909.]

GRIFFITH DAVIES *et al.*, *Appellants*, v. PETER WICKSTROM,
Respondent.¹

BOUNDARIES—DESCRIPTION—CONFLICTING CALLS. Where courses and distances are conflicting, there is no invariable rule that one should control the other, or that calls are controlling in their order, if there are other aids in determining the intent of the parties.

SAME—CONSTRUCTION BY PARTIES. Where the calls in a description are conflicting, the construction placed thereon by the parties in locating the lines on the ground may be resorted to, and is conclusive as between the parties.

SAME—CONSTRUCTION BY PARTIES—NOTICE—BONA FIDE PURCHASER. The building and maintenance of a line fence, with adverse possession of the land inclosed, under the consent of the grantor and his successors in interest, is sufficient to put a purchaser upon inquiry as to the contemporaneous construction placed by the parties upon conflicting calls in the description.

ADVERSE POSSESSION—EVIDENCE—SUFFICIENCY. Title by adverse possession is shown where it appears that the purchaser inclosed the land by a fence upon the supposed line in 1895, at once starting a clearing, set out an orchard in 1896 and cared for the trees ever since, and maintained the fence and used the land for ten years continuously, at all times claiming to own it.

¹Reported in 105 Pac. 454.

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Appeal from a judgment of the superior court for King county, Gilliam, J., entered November 25, 1908, upon findings in favor of the defendant, after a trial before the court without a jury, in an action of ejectment. Affirmed.

George E. de Steiguer, for appellants.

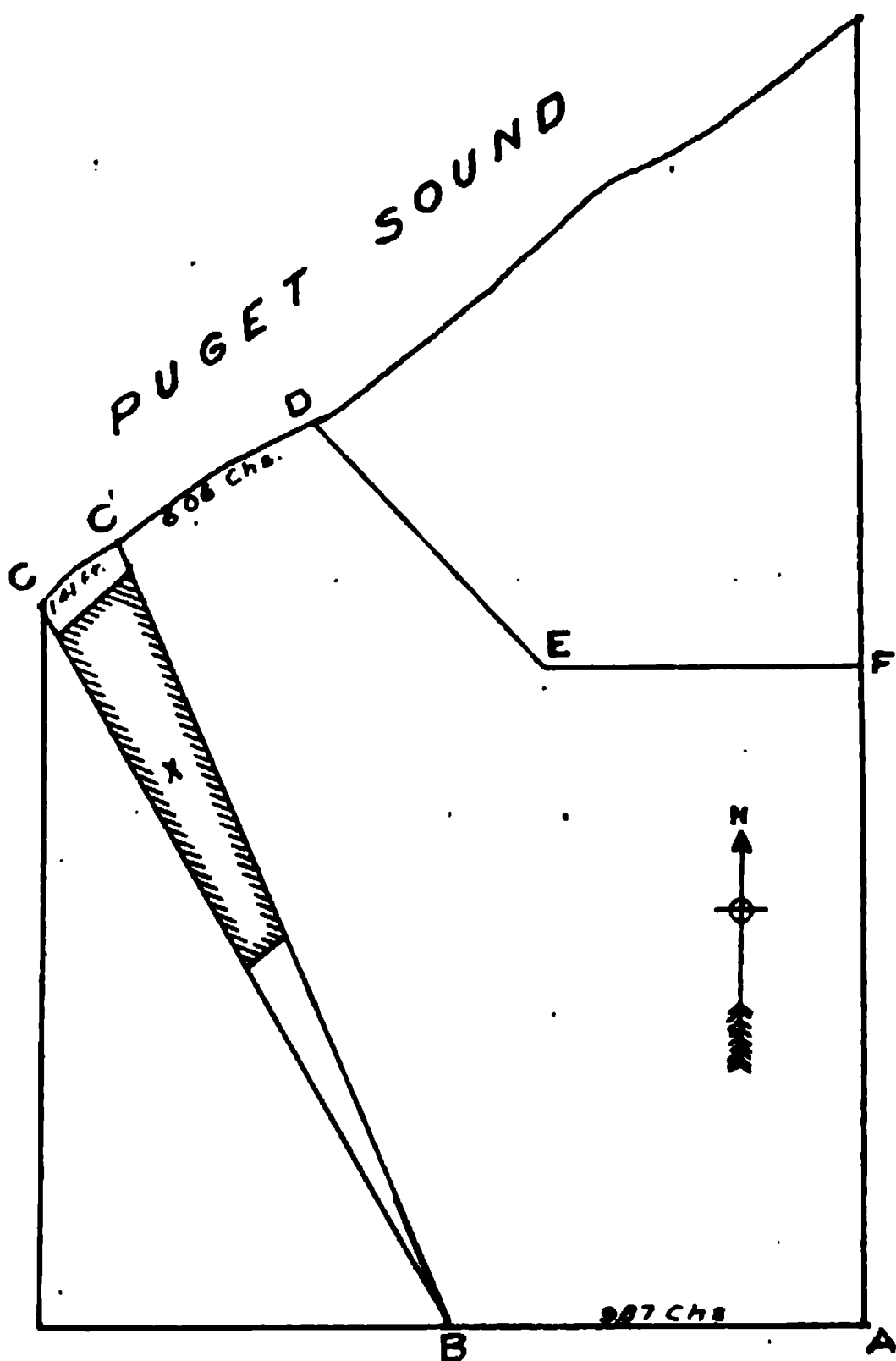
Bausman & Kelleher, for respondent.

PARKER, J.— This is an action of ejectment by which the plaintiffs seek to recover from the defendant certain land in West Seattle, which they claim he is unlawfully withholding from them. Trial was had by the court without a jury, resulting in findings and judgment in favor of defendant, from which plaintiffs have appealed.

Reference to the accompanying plat, compiled from the record, which shows approximately the lines and land in dispute, will render the facts more readily understood, in connection with a statement of them. The substance of the findings made by the trial court are, that in 1874, by mesne conveyances from the United States, the defendant became possessed in fee simple, of lot 1, of Section 10, Township 24, North, of Range 3, East, which includes the land in controversy; that in 1876 he sold and conveyed to Jacob R. Olsen and Jahan Brygger a portion of lot 1, described as follows:

“Commencing at the southeast corner of Lot 1 of Section 10, Township 24, North of Range 3 East, and running thence west along the south boundary line of said Lot 1, 9 chains and 87 links; thence north $80^{\circ} 26'$ west 20 chains to the meander line of the shore of Puget Sound; thence along said meander line north 47° east 6 chains and 6 links, to the mouth of a small brook; thence south $37^{\circ} 57'$ east 7 chains and 35 links; thence east 10 chains and 1 link to the section line between Sections 10 and 11; thence south along said section line 16 chains and 46 links to the place of beginning.”

PLAT OF LOT I.



X—Land in dispute.

D—Mouth of small brook.

That soon after the sale and conveyance, the defendant and his grantees measured along the shore line of Puget Sound a distance of 6.06 chains southwesterly from the mouth of the small brook mentioned in the deed, and established the dividing line between their respective lands, this being the line BC', intended to be described in the deed; that in the spring of 1895 defendant built a fence upon the line so established, which, together with others, enclosed the land in controversy; that defendant has maintained said fence and enclosure sub-

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stantially ever since; that since the building of the fence defendant has uninterruptedly by himself and his agents and tenants, cleared, improved and cultivated portions of the land, and for more than ten years prior to the commencement of this action has been in the actual, open, notorious, visible and uninterrupted possession of the land, and is now in possession thereof, and during all of said time he has asserted the right of ownership and possession of said land adverse to plaintiffs and to all the world. Plaintiff's counsel excepted to these findings, especially to the portions relating to establishing of the line, building the fence thereon, and acts of adverse possession; and requested findings favorable to plaintiffs as successors in interest, by mesne conveyances, of Olsen and Brygger; which being refused, noted exceptions to such refusal.

Learned counsel for appellant makes two general contentions, which are in substance, that the trial court erred in holding, (1) that the deed from defendant to Olsen and Brygger did not convey the land in controversy; and (2) that defendant's adverse possession was such as to give him good title to the land involved.

It is plain that the calls in the deed of defendant to Olsen and Brygger, are not consistent, in that the course given for the southwestern boundary, BC, if followed literally, will extend the northwestern or waterfront boundary, CC'D, about 141 feet in addition to the 6.06 chains called for in the description. This is on the assumption that the mouth of the small brook was, at the date of the deed, and has at all times since then been, in the same place, which we think is fully warranted by the evidence. It is argued by counsel for appellant that the course of the call BC, must control the length of the call C'D, because, (1) "If there is an inconsistency between different calls, ordinarily the first call controls"; and (2) "If there is an inconsistency between distance and direction, direction controls." While there are decisions of the courts which, in a measure, seem to recognize these rules as

aids in arriving at the true intention of the parties to a conveyance, we do not think any such rules can be deduced from the decisions so as to be made of universal application. The degree of aid such rules may render in controlling inconsistent calls in a description will necessarily be affected to the extent that other legitimate aids are present or absent. In Warvelle on Vendors (2d ed.), § 377, it is stated:

“It is often stated, as a general proposition, that course controls distance, yet there is no universal rule that obliges us to prefer one to the other; and when natural and ascertained objects are wanting, and the course and distance cannot be reconciled, one or the other may be preferred according to circumstances.”

In the case of *Preston's Heirs v. Bowmar*, 6 Wheat. 580, 582, 5 L. Ed. 336, Justice Story, speaking for the United States supreme court, said:

“It may be laid down as an universal rule, that course and distance yield to natural and ascertained objects. But where these are wanting, and the course and distance cannot be reconciled, there is no universal rule that obliges us to prefer the one or the other. Cases may exist in which the one or the other may be preferred upon a minute examination of all the circumstances.”

See, also, *Loring v. Norton*, 8 Me. 61.

We believe the question of whether or not the calls will be controlling according to their order should also be determined upon the principle announced by these authorities, and that the rules sought to be invoked by learned counsel, whatever their influence may be in the absence of all other aids, they do not, by any means, have that degree of force the law gives to the rule which controls courses and distances by physical monuments upon the ground. The case of *Stokes v. Curtis*, 49 Wash. 235, 239, 94 Pac. 1083, is cited as an instance where this court held the first call controlled the second. But it appears in that case, that the latter call, being one of distance, read, “more or less”, thus rendering it less certain than the former call, which read “east”, unqualified. In the

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cases of *Den ex dem. Harry v. Graham*, 1 Dev. & B. (N. C.) 76, 27 Am. Dec. 226; and *Blackburn v. Nelson*, 100 Cal. 336, 34 Pac. 775, cited by counsel, the calls were held to be controlling in their order, but in those cases there seems to be an entire absence of all other aids in determining the intent of the parties. Our attention has not been called to any decision where the rule has been controlling, save in the absence of all other aids.

What have we then, beyond the uncertain and inconsistent language of these calls in the description, to assist us in arriving at the intention of the parties as to the land conveyed? It is elementary that when the language of the description renders the location of the land doubtful by insufficient or inconsistent description, the construction put upon the deed by the parties in locating the premises upon the ground may be resorted to for the purpose of determining their intention. 1 Warvelle, Vendors (2d ed.), §§ 373-4; 2 Devlin, Deeds (2d ed.), § 1042; 13 Cyc. 627.

The finding of the trial court to the effect that the parties located the line BC' upon the ground soon after the execution of the deed, as their common boundary, is challenged by appellants' counsel as not being warranted by the evidence. We have read all of the evidence and are of the opinion this finding is fully sustained. If this controversy was between the respondent and his original grantees, there would be nothing further in the cause to determine. Their own construction of the deed would determine their rights.

What is there to give notice to the successors in interest of Olsen and Brygger, as these appellants have become by mesne conveyances, that this is the construction the parties gave to the deed? There is evidence which we think warrants the conclusion that about the year 1878 the respondent built a fence upon the line BC' running back from C' as far as the southeasterly end of the land here in dispute to the foot of the hill, beyond which the land lays on a steep hillside, and that such fence remained there with the knowledge and con-

sent of his grantees Olsen and Brygger, at least until after they parted with title to their land by deed to William H. Hughes and his associates in December, 1882, which deed describes the land in the same language as in the deed from respondent to Olsen and Brygger, the third call therein being "*6 chains and 6 links to the mouth of a small brook.*" Just how long this fence remained there is not clear, but it was removed while Hughes and his associates owned the adjoining land, and we think the evidence shows the removal was not by consent of respondent. Prior to 1895 William H. Hughes and wife acquired the interest of their associates. This brings us to the building of the fence by respondent on the line BC', in 1895, which with other fences inclosed the land in dispute with other land of respondent. This was the beginning of respondent's present adverse possession, as found by the trial court.

The appellants acquired their interest in the land from William H. Hughes and wife in July, 1897, by a deed which purported to convey the land in controversy with other land to the northeast. The evidence we think is clear that at that time the fence which respondent had built in 1895 on the line BC', which with others inclosed the land in dispute, was still there, and that respondent's possession was of such an open and notorious character as to inform the appellants he was then claiming to that line. This fence and possession of respondent was, we think, also sufficient to put the appellants upon inquiry and suggest to them the probability of that being the line intended as the southwestern boundary of the land described in the two earlier deeds upon which the title they were then acquiring rested.

As to the evidence of respondent's continuous adverse possession following 1895, it is very voluminous and somewhat conflicting. However, it tends strongly to show, that he commenced to clear the land soon after inclosing it in 1895; that he set out a portion of the land to orchard, together with his other land adjoining, in the fall and winter of 1896-7,

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then planting upon the disputed land 20 or 25 trees which have been cared for ever since; that he built a corduroy road along and near the fence on the line BC', and also a gate in his water front fence near C' which have been maintained and used by him since inclosing the land; that he maintained the fence built in 1895 until the bringing of this action, though it also appears there were portions of the time when it became in a bad state of repair along the northerly portion (about one-half) of the land in dispute, which portion is low and at times covered by the tide. It is clear that respondent at all times claimed to own the land. In view of all the evidence, we think the learned trial court was fully warranted in concluding that respondent was in continuous, visible possession of the land in controversy, adverse to appellants, accompanied by claim of ownership therein, for more than ten years prior to the commencement of the action. *Bellingham Bay Land Co. v. Dibble*, 4 Wash. 764, 31 Pac. 30; *Northern Pac. R. Co. v. Spokane*, 45 Wash. 229, 88 Pac. 135; 1 Cyc. 1022.

We are of the opinion that the judgment should be affirmed. It is so ordered.

RUDKIN, C. J., DUNBAR, CROW, and MOUNT, JJ., concur.

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[No. 8277. Department One. December 2, 1909.]

M. J. McGUINNESS *et al.*, *Respondents*, v. LEONARD C.
HARGISS, *Appellant*.¹

QUIETING TITLE—CLOUD—INVALID CLAIM. Under Bal. Code, § 5521, for the determination of adverse claims, a decree to quiet title may be had where the defendant filed for record an invalid notice, claiming a contract for purchase, although the claim did not constitute a cloud within equitable principles.

LIBEL AND SLANDER—SLANDER OF TITLE—SPECIAL DAMAGES—ATTORNEY'S FEES. In an action for slander of title, only special damages can be recovered, and they must be pleaded and proved; and a claim for an attorney's fee in the current action is not recoverable, either as damages or costs, other than statutory.

Appeal from a judgment of the superior court for Snohomish county, Black, J., entered June 2, 1909, upon findings in favor of the plaintiffs, in an action to quiet title and for damages. Affirmed in part and reversed in part.

Frederick R. Burch, for appellant.

Robert McMurchie, for respondents.

MORRIS, J.—Respondents charge appellant with slandering their title to real estate, and seek damages and the removal from record of the offending instrument as a cloud upon their title. The claim for damages is general, with the exception of a special plea for attorney's fees in this action. The court below made findings in favor of respondents, holding the recorded writing to be a slander and cloud upon respondents' title, and awarding them damages in the sum of \$350; and the case is brought here on appeal.

But two questions are presented on the appeal: Does the record complained of constitute a cloud upon title? and are respondents upon the pleadings and proof entitled to damages? On October 8, 1908, appellant filed for record in the

¹Reported in 105 Pac. 233.

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office of the county auditor for Snohomish county, the following writing:

"LEGAL NOTICE OF CONTRACT OF SALE.

"Notice is hereby given that I, Leonard C. Hargiss, a bachelor of Washington, have paid to M. J. McGuinness of Snohomish, Washington, the sum of one hundred dollars gold coin on 80 acres, described as follows: The N. W. $\frac{1}{4}$ of the N. W. $\frac{1}{4}$ of Section 12, Township 27, Range 5, East W. M., also the N. E. $\frac{1}{4}$ of the N. E. $\frac{1}{4}$ of Section 11, Township 27, Range 5, East W. M., in Snohomish county, state of Washington, full purchase price to be \$1,675.00, balance of \$1,575.00 to be paid when said M. J. McGuinness furnishes clear abstract showing good title and full warrantee deed, clear of all encumbrances. That the said Leonard C. Hargiss is ready and willing to pay the full amount in cash to carry out the deal, and in event said M. J. McGuinness can not give good title to said land, said Leonard C. Hargiss claims from M. J. McGuinness \$10,000 damages, and a lien on said land until it is paid. (Signed) Leonard C. Hargiss."

Appellant justified this record with the contention that he had entered into a contract with respondents for the purchase of this land, which they refused to carry out. It is not necessary to refer to the evidence of the parties in regard to this alleged contract, inasmuch as it will be of no aid in the determination of the questions involved in the appeal. The court below found that no contract had been entered into between the parties, and whatever there was of negotiation was ended on August 24, when a Seattle bank, acting for appellant, wrote to a Snohomish bank, in which a deed, abstract, and satisfaction of mortgage had been deposited as part of the negotiations, in part as follows: "I beg to advise you that the McGuinness deal appears to be entirely off." We need only say that the evidence strongly supports the findings of the court upon the question of the contract, and we are of the same opinion.

It is contended by appellant that the instrument complained of is not a cloud, because it could not be made the

basis for either acquiring or maintaining an interest in the land, and that in order to constitute a cloud the instrument must upon its face confer some right, title, or interest in the land. Such is unquestionably the rule in many of the states, but in this state the rule was announced, as far back as *Lemon v. Waterman*, 2 Wash. Ter. 485, 7 Pac. 899, that a decree quieting title might be had notwithstanding the absolute invalidity of the claim or estate moved against, upon the theory, as stated in *Watson v. Glover*, 21 Wash. 677, 59 Pac. 516, that Ballinger's Code, § 5521, had enlarged "equity jurisdiction so as to embrace a case wherein the adverse interest or claim does not constitute a cloud (according to the principles of equity). The court then refers to the fact that California and Oregon have similar statutes, and quotes from *Castro v. Barry*, 79 Cal. 443, 21 Pac. 946, in saying that the object of the statute is to authorize proceedings "for the purpose of stopping the mouth of a person who has asserted or who is asserting a claim to the plaintiff's property. It is not aimed at a particular piece of evidence, but at the pretensions of the individual;" and from *Teal v. Collins*, 9 Ore. 89, wherein the court says: "It is sufficient that the party in possession is incommoded or damnified by the assertion of some claim or interest in the property adverse to him." Similar rulings have been announced in *Jackson v. Tatebo*, 3 Wash. 456, 28 Pac. 916, and *Montgomery v. Cowlitz County*, 14 Wash. 230, 44 Pac. 259. We therefore hold, upon the first point submitted, that the writing signed by appellant constituted a cloud upon respondents' title.

Upon the second point submitted, we are of the opinion that the court below erred. In actions of slander of title it is the recognized rule that only special damages are recoverable, and that such damages must be pleaded and proved. 25 Am. & Eng. Ency. Law 1079; 25 Cyc. 561. There was no plea nor proof of special damage, except the claim for an attorney's fee for the prosecution of this action. We have uniformly held that in this state attorney's fees, either as dam-

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ages or costs, other than statutory, are not recoverable. In *Spencer v. Commercial Co.*, 36 Wash. 374, 78 Pac. 914, the court attempts to forever settle the question by saying: "It has been so often decided that the granting of attorney's fees in cases of this kind was error that it is no longer a proper subject for discussion."

Other cases holding the rule are: *Larson v. Winder*, 14 Wash. 647, 45 Pac. 315; *Trumble v. Trumble*, 26 Wash. 133, 66 Pac. 124; *Ditmar v. Ditmar*, 27 Wash. 13, 67 Pac. 353, 91 Am. St. 817; *Legg v. Legg*, 34 Wash. 132, 75 Pac. 130; *Criswell v. Directors School Dist. No. 24*, 34 Wash. 420, 75 Pac. 984; *McGill v. Fuller & Co.*, 45 Wash. 615, 88 Pac. 1038.

While there was no plea of other special damage, there was an attempt to prove loss of a subsequent sale at a higher price, but such evidence did not commend itself to the court, as is evidenced by its language as found in the record:

"I don't think Mr. McGuinness has been damaged very much except with reference to the expense of this law suit, and I think he is entitled to attorney's fees. The only evidence about the value of attorney's fees in this matter is three hundred and fifty dollars, and I am inclined to think that is liberal, and I have made up my mind to allow as total damages three hundred and fifty dollars. You can call it attorney's fees or whatever you please."

It is evident that, in the opinion of the court below, no damage was established, and that the award of \$350 is given for attorney's fees in this action.

The judgment, in so far as it decrees a cloud upon respondents' title, is affirmed. In so far as it awards them damages, it is reversed. The cause is remanded with instructions to modify in accordance with these views.

RUDKIN, C. J., GOSE, FULLERTON, and CHADWICK, JJ., concur.

[No. 8389. Department Two. December 2, 1909.]

DANIEL JONES, *Appellant*, v. SEATTLE BRICK & TILE
COMPANY, *Respondent*.¹

EXECUTORS AND ADMINISTRATORS—SALES—VALIDITY—IRREGULARITIES. Upon an administrator's sale of mortgaged property to pay off the mortgage, in which, upon petition and notice therefor, the court ordered a sale of other property in case of a deficiency, a sale accordingly to pay the deficiency, with deed issued, confirmed by the court, is not void (as against parties claiming under a title not derived from the deceased) by reason of the fact that Bal. Code, § 6289, requires, in case of such a deficiency, that the mortgagee file a claim for the balance payable in due course of administration; since the court had jurisdiction, and Bal. Code, § 6475, provides that no sale shall be void or called in question by one claiming adversely to the title of the deceased or under a title not derived from the deceased, for any irregularity, if it appears that the administrator was licensed to make the sale by an order of a court having jurisdiction of the estate, if a deed in legal form was executed and delivered; the omission of statutory proceedings for a deficiency sale in due course of administration being in such case an irregularity only.

TAXATION—FORECLOSURE—VALIDITY—PROCESS—SERVICE ON PARTIES NOT INTERESTED. A foreclosure of a tax delinquency certificate, under the act of 1899, which did not define the owner or authorize proceedings against the persons appearing as owners on the tax rolls, is void, where the action proceeded upon personal service against defendants who had no interest in the land, and no publication was had against unknown owners or any other service had; as the owner never had his day in court.

JUDGMENT—PRESUMPTIONS—PROCESS. Where the findings of the court show that no service was had except upon parties who had no interest in the land, there is no presumption in support of jurisdiction that another valid service was had upon other necessary parties.

Appeal from a judgment of the superior court for King county, Yakey, J., entered August 13, 1909, upon findings in favor of the defendant, in an action to quiet title against a tax foreclosure. Reversed.

¹Reported in 105 Pac. 238.

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Opinion Per DUNBAR, J.

Willett, Oleson & Willett, for appellant.*Peters & Powell* and *Marion Edwards*, for respondent.

DUNBAR, J.—This action was brought by plaintiff, to declare void two tax deeds, alleged to be clouds on his title to lots 8 and 9, block 6, of South Seattle. The complaint alleges title in plaintiff by mesne conveyance, through the administrator of the estate of J. F. Hawks, deceased, and that the tax foreclosure proceedings resulting in a tax deed to defendant's grantor were void, for the reason that the court had no jurisdiction to enter judgment in which the tax sale was had. Proper tender was made. The defendant answered, and put in issue plaintiff's claim of title from the Hawks estate, denied the invalidity of the tax foreclosure proceedings and admitted the issuing of the certificates and bringing of the suits as alleged. The defendant further alleged that the name of George R. Fisher appeared on the treasurer's roll for the year 1899 as the owner of said lots. Certificates of delinquency were issued to one Anna F. Smith, and regularly foreclosed. In the years 1895-6-7-8 and 1900 the owners of such lots appeared on the treasurer's rolls as unknown. The cause was tried to the court. It made findings of facts and conclusions of law in favor of the defendant. Judgment was entered, and appeal follows.

On the first proposition, viz., the validity of appellant's title, the court found the death of Hawks as alleged, the ownership in fee simple in him of the land in dispute; that he died intestate, and that thereafter, by petition, one Henry W. Lung was appointed administrator of his estate; that the superior court had jurisdiction to administer the estate of the deceased, and that said administrator Lung duly qualified as administrator and entered upon the discharge of his trust; that an inventory of said estate was made and filed, wherein was listed and appraised, as belonging to the estate of said deceased, divers and sundry parcels of real property, situated in King county, including said lots 8 and 9; that no

claim was ever filed or proved against said estate, except one claim by William Curtis Ward, made upon a promissory note of said deceased, payable to order of Daniel Jones, which note was secured by a mortgage on certain of the lots described in the inventory; that this note was, before maturity, indorsed and delivered by said Daniel Jones to said William Curtis Ward, was duly assigned, and was proved and allowed by the administrator; that said note and mortgage were filed in said estate, the amount of said claim being \$4,715; that no person ever made any application to said court to sell any part of said estate, except that on November 29, 1899, said William Curtis Ward presented to said court a petition for the sale of said mortgaged property, reciting that he had theretofore filed his claim, etc., and reciting the conditions of the mortgage; reciting the fact that the estate showed that the deceased left no personal property, the value of the estate, and setting forth what amount was due him from the estate; setting forth no other facts, but praying for a sale of the mortgaged property at public auction, and praying that if the amount realized at such sale should be insufficient to pay the amount of such claim, then so much of the residue of such estate as might be necessary should be sold at public sale upon giving due notice thereof as provided by law; that on the face of said petition and in the indorsement thereon the same was denominated "Petition to sell mortgaged property"; that an order to show cause was thereupon regularly issued, which order recited the filing of said petition to sell the mortgaged property, and in the event of a deficiency, to sell so much as might be necessary of the balance of said estate to satisfy said petitioner's claim, which order to show cause was regularly served on said administrator; that thereafter an amended order to show cause was issued on said petition, returnable February 9, 1900, which said amended order to show cause recited the filing of said petition to sell the mortgaged property, and so much of the rest of said estate as might be necessary to pay any deficiency, and which

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said amended order to show cause was duly, regularly, and legally served upon said administrator, and was published for four successive weeks in a weekly newspaper printed and published in King county, Washington, and of general circulation therein; that on the day fixed in said amended order to show cause, the matter came on to be heard in such court and cause, and thereupon the court made and entered the following order, omitting the first part which it is not necessary to set forth, as it was a simple order to sell the mortgaged property:

“And if said property is insufficient to satisfy said claim, then said administrator is authorized and directed after giving due notice as provided by law, to sell from the residue of such estate as much as may be necessary to satisfy the balance due upon said claim,”

duly signed; that under and pursuant to said order, notice of sale of the premises described in said mortgage was duly given, and a sale thereof regularly held, and the amount of the bid was not sufficient to pay the mortgage indebtedness; that thereupon, without proof of any deficiency and without further order or direction of the court as to the sale of any other property, and without any further petition or order in that regard whatsoever, another notice of administrator's sale was given by the administrator that, on June 16, 1900, he would sell, at the front door of the courthouse in the city of Seattle, King county, Washington, at public auction, to the highest bidder for cash, according to law and the order of the court, the remainder of the said real estate inventoried and including the aforesaid lots 8 and 9, of block 6, Plan of South Seattle; stating in such notice that such sale was to be made to raise the balance of any claim of said William Curtis Ward; that at such date sale was made and return made in the usual manner to said court, reciting that the said sale had been made according to the notice given, and that all of the property listed in the inventory of said estate had been sold; that on July 2, 1900, an order confirming sale was made

by said court, in which said notices are recited and in which it was recited that the administrator had duly made his return on the sale, and that it had been proved to the court; that in pursuance of due notice, as required by law, wherein said property was described with sufficient certainty, a sale of all property listed in said inventory had been made to said William Curtis Ward, etc., and that the amount bid was not disproportionate to the value of said property, and an order was made confirming the sale; that the administrator was directed to execute and deliver to the purchaser a proper conveyance of said real estate; that thereafter the said administrator executed to said William Curtis Ward an administrator's deed, sufficient in form and complying with the law in regard to administrator's deeds. Upon these facts—and the facts found by the court are not excepted to by either appellant or respondent—the court concluded that no title passed to William Curtis Ward to the lots in controversy by virtue of the administrator's sale mentioned.

In this conclusion we think the court erred. It is the contention of respondent, that no representation was made in the petition sufficient to call forth the power of the court to decree a sale of the unincumbered property; that Ward's petition presented only the facts necessary to inform the court that he had a good mortgage, and that the only other matter to be decided upon the hearing was whether it would be expedient to redeem the mortgaged property. It is objected that it did not give a list of the debts outstanding, except the debt of the petitioner; that it did not describe all the real estate—only the mortgaged property—and did not state the condition and value of any; that it did not give the names and ages of the heirs; that it was in violation of Bal. Code, § 6289, which provides:

“If said sale of the mortgaged premises shall be insufficient to secure the mortgage debt, the mortgagee shall file a claim for balance, authenticated as other claims and payable in due course of administration.”

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It doubtless is a fact that some of the things required by the statute were not set forth in the petition in this case; but the record does show that the court had jurisdiction of the subject-matter, viz., the property sold, and of the administrator as an officer of the court, and that the omission of statutory provisions was an irregularity which was cured by § 3 of the act of March 28, 1890 (Laws 1889-90, p. 82), which is as follows:

“If the validity of a sale is drawn in question by a person claiming adversely to the title of the deceased, or the ward, or claiming under a title that is not derived from or through the deceased or ward, the sale shall not be void on account of any irregularity in the proceedings if it appears that the executor, administrator or guardian was licensed to make the sale by a probate or superior court having jurisdiction of the estate, and that he did accordingly execute and acknowledge, in legal form, a deed for the conveyance of the premises.” Bal. Code, § 6475.

Now, there can be no question but that the court making this order had jurisdiction of the estate; that he made an order of sale; and that the administrator did accordingly execute and acknowledge in legal form a deed for the conveyance of the premises after having made the sale. It seems to us the case falls squarely within the rule announced in *Ackerson v. Orchard*, 7 Wash. 377, 34 Pac. 1106, 35 Pac. 605, where it was decided that, although the petition for an order for the sale of real estate is defective and irregular for the reason that it fails to describe all the decedent's real estate, and fails to state the amount of personal estate coming into the administrator's hands and his disposition thereof, and does not set forth the value of the lands other than by reference to their appraised value, such irregularities will not affect the jurisdiction of the court to order the sale.

The court in the trial of this cause found, that the probate court had jurisdiction to administer the estate of the deceased; that the administrator was duly qualified; that an inventory had been filed, and that the lots described were set

forth in the inventory; and while it is true that the petition to sell does not specify the lots, it asked for the sale of the balance of the real estate, if it was necessary to sell it for the purpose of paying the mortgage debt; and the order was directly made by the court to sell the additional property if it were found necessary to sell it for that purpose. The orders and petitions being construed together, there was no lack of notice given to those who were interested as to what was actually asked for and intended to be accomplished, so far as the particular lands sold are concerned. It is true that there was no showing made to the court, after it was ascertained that the mortgaged property did not realize the amount of the mortgage indebtedness; but this possibility was anticipated in the application to sell, and in the direct order of the court that it should be sold in case the realization from the mortgaged property was not sufficient. While it would have been more in harmony with the direct provisions of the statute for this showing to have been made after the sale of the mortgaged premises and the application made at that time, these matters are only irregularities and did not go to the jurisdiction of the court or to the essential merits of the case. The notice, which was the important thing, was given as effectively in the one instance as it could be in the other, the notice to show cause why the order of the court should not be carried into effect having been regularly published and served; and upon the hearing, in pursuance of the order to show cause, the court made a direct and positive order to sell the residue of the estate, the inventory of which had been previously filed showing that there was no personal property belonging to the estate. Hence there was no necessity for the carrying out of the statutory provision in relation to showing in that regard, at the time of the application to sell the real estate.

The court finds that, in pursuance of said order, notice was given, and a sale was regularly held which was afterwards confirmed; and in the order confirming the sale the court

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finds that the administrator had duly made his return of sale, and that it had been proved to the court; that in pursuance of due notice as required by law, wherein said property was described with sufficient certainty, the sale had been made, and that the sum paid was not disproportionate to the value of said property. The jurisdictional facts being established, it being shown that the matters which were claimed to have been omitted did not reach the merits of the case, that no one was or could have been misled in any way by such omissions, it seems to us that the case falls squarely within the statute which we have cited above; that the statute was enacted for the purpose of meeting just such cases as this; that it is the policy of the law that irregularities of this kind should be seasonably called to the attention of the court at the time when confirmation is asked for, and that the confirmation forecloses all irregularities of this kind. We, therefore, think that the deed passed good title to the lands in question to the appellant in this case.

The court also found that the appellant had not established the invalidity of the tax foreclosure sales of said lots 8 and 9. The finding of the court in regard to that branch of the case, in brief, was as follows: That these lots 8 and 9 were assessed on the assessment and tax roll of King county, Washington, to unknown owners, for the year 1895 to and including the year 1900, except for the year 1899; that in said year the property was assessed to one George R. Fisher; that on December 27, 1900, the treasurer of King county issued to Anna F. Smith a delinquency tax certificate for the year 1896 to the lots above described; that in such certificate it was stated that the owner of said premises was unknown, and that the said Anna F. Smith paid the taxes for the succeeding years, viz., 1897-8-9, as subpayments under said certificates; that on January 28, 1901, the said Anna F. Smith filed, in the superior court of King county, state of Washington, her application to foreclose said certificates of delinquency, in which such application said Anna F. Smith

was named as plaintiff and W. I. Wadleigh, Anna Wadleigh his wife, George I. Fisher as trustee, and the First National Bank of Seattle, were named as defendants, and no other persons were named or referred to as defendants therein, and no mention was made of any persons unknown. The court found that each of said named defendants was a stranger to the title of said lots 8 and 9, and none of them had any interest therein whatever as a matter of fact; that notices and summonses in said causes, regular in form and substance, were directed to and personally served upon said named defendants, and no other persons, but that no summons was published in either of said actions, no service of notice was made in any manner upon unknown owners, no other or different applications for judgment were ever made, and no other notices or summonses were ever issued or served. Thereafter, in such tax foreclosure actions, default judgments were entered against all of the named defendants, and the lien was foreclosed, and sale was made in accordance with the provisions of the law. So that the question here is, did the court, under these proceedings, obtain jurisdiction to foreclose these certificates of delinquency and sell this land. If not, the sale was void and the court erred in its conclusion of law.

This action was prosecuted prior to the amendment of 1901 (Laws 1901, p. 385, § 3), which provides that the names of the person or persons, appearing on the treasurer's rolls as the owner or owners of said property for the purposes of this act, shall be considered and treated as the owner or owners of said property; but was prosecuted under the laws of 1899 (Laws 1899, p. 297, § 15), which contain no such provision nor attempt to define the owner. So that the owner must be construed under that law to be an owner of the land as the word is generally understood in statutes and in common parlance. It seems elementary that, if these persons named as defendants in this proceeding were not, as the court has found, owners of the land, and had not any interest therein whatsoever, as a matter of fact, and that

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the said George I. Fisher had no actual interest or ownership either individually or as a trustee, and there was no other notice given by publication or otherwise to any one else, the court could not have obtained jurisdiction to order the sale of these lots, and that the true owner has never had his day in court. This is not an irregularity, but a question of notice going to the jurisdiction.

It is urged by the respondent that, for aught shown by the record in this case, there was a service made after that date and before the decrees; that it will not be presumed that the court acted without jurisdiction; that every presumption is in favor of the validity of the decrees; and that the presence of one defective service in a record does not rebut the presumption that another service was made if time enough elapsed before decree. This, no doubt, is true with reference to decrees of courts of general jurisdiction; but that question is foreclosed in this case by the findings of the court, which stand here as the true record of the case. The case came up purely upon the question of whether the findings support the judgment, and the findings affirmatively show that no other persons were served, and that no summons by publication was ever issued.

We think the court acted without jurisdiction in the sale of these lots, and that the title of the appellant was good. The judgment will therefore be reversed, with instructions to enter a judgment according to the prayer of the complaint.

RUDKIN, C. J., PARKER, MOUNT, and CROW, JJ., concur.

[No. 8217. Department Two. December 3, 1909.]

THE STATE OF WASHINGTON, *on the Relation of the City of South Bend, Respondent*, v. MOUNTAIN SPRING COMPANY, *Appellant*.¹

WATERS — WATER COMPANIES — FRANCHISE — COMPELLING PUBLIC SERVICE—DEFENSES—DEFAULT OF CITY. The failure of a city to pay hydrant rental, through its inability to do so for the time being, stipulated for in a water company's franchise, is not a defense to an action by the state on behalf of the citizens to compel the water company to furnish water to the citizens pursuant to the obligations of the franchise, where the company had not abandoned its franchise or vacated the streets.

SAME—ESTOPPEL. In an action to compel a water company to supply water to citizens, the company is estopped to plead the indivisibility of the contract and to set up the default of the city to pay hydrant rentals, where, after determination that the city was powerless to pay the rentals, the company elected to proceed with that part of the contract eliminated and was claiming benefits under its franchise.

Appeal from a judgment of the superior court for Pacific county, Frater, J., entered December 24, 1908, upon findings in favor of the plaintiff, after a trial on the merits before the court without a jury, in an action for a mandate to compel a water company to furnish water to the inhabitants of a city. Affirmed.

Shepard & Flett, for appellant, contended, among other things, that the city could not insist upon compliance with the franchise when it itself was guilty of violations. Abbott, *Municipal Corporations* (old ed.), § 158A, notes 4, 11; *Id.*, § 160, note 8; 7 *Am. & Eng. Ency. Law* (2d ed.), 95, 96, 150; *Bienville Water Supply Co. v. Mobile*, 125 Ala. 178, 27 South. 781; *Henry v. Sacramento*, 116 Cal. 628, 48 Pac. 728; *City of Winfield v. Winfield Water Co.*, 51 Kan. 70, 32 Pac. 663; *Winfield Water Co. v. Winfield*, 51 Kan. 104, 33 Pac. 714. Mandamus will not lie unless the relator has an

¹Reported in 105 Pac. 243.

essential moral right to the relief prayed for. 26 Cyc. pp. 139, 143, 144, 146, note 46, p. 150, note 61, p. 151, note 65, p. 154, note 72; Shorett, *Mandamus*, 223; 19 Am. & Eng. Ency. Law, 717, 725-727, 731, and note 1, p. 732, 751-3, 753-4, notes 6, 10; 26 *Id.* 147, and cases cited in note 48; Spelling, *Extraordinary Relief*, p. 1130, § 1380; *Wiedwald v. Dodson*, 95 Cal. 450, 30 Pac. 580. The relator is estopped by laches from insisting upon a strict compliance with the franchise. Abbott, *Municipal Corporations* (old ed.), 159 A, notes 8 and 9; *Grand Rapids v. Grand Rapids Hydraulic Co.*, 66 Mich. 606, 33 N. W. 749; *Creston Waterworks Co. v. Creston*, 101 Iowa 687, 70 N. W. 739; *Wiley v. Athol*, 150 Mass. 426, 23 N. E. 311, 6 L. R. A. 342.

Chas. E. Miller, Welsh & Welsh, and *John I. O'Phelan*, for respondent, contended, *inter alia*, that the contract will be construed as divisible, since the parties have so construed it. *Topliff v. Topliff*, 122 U. S. 121, 7 Sup. Ct. 1057, 30 L. Ed. 1110; *Peterson v. Philadelphia Mfg. & Trust Co.*, 33 Wash. 464, 74 Pac. 585. Especially where, as in this case, the contract is with a municipality and its proposed indebtedness may exceed the constitutional limit. *Gutta-Percha & Rubber Mfg. Co. v. Ogalalla*, 40 Neb. 775, 59 N. W. 513, 42 Am. St. 696; *Keihl v. South Bend*, 76 Fed. 921; *Soule v. Seattle*, 6 Wash. 315, 33 Pac. 384, 1080. The law of the place entered into and became a part of the contract, and inability to pay hydrant rentals is not a default. 8 Cyc. 933; 9 Cyc. 582; *La Selle v. Woolery*, 14 Wash. 70, 44 Pac. 115, 53 Am. St. 855, 32 L. R. A. 73; *Western Union Telegraph Co. v. Pratt*, 18 Okl. 274, 89 Pac. 237; *Wright v. Computing Scale Co.*, 47 Wash. 107, 91 Pac. 571; *Walker v. Whitehead*, 16 Wall. 314, 21 L. Ed. 357; *Keihl v. South Bend*, *supra*; *Averill Mach. Co. v. Allbritton*, 51 Wash. 30, 97 Pac. 1082; *City of Laporte v. Gamewell Fire Alarm Tel. Co.*, 146 Ind. 466, 45 N. E. 588, 58 Am. St. 359, 35 L. R. A. 686; *Gutta-Percha etc. Mfg. Co. v. Ogalalla*, *supra*. *Mandamus* was the

proper remedy. 26 Cyc. 378; 30 Am. & Eng. Ency. Law (2d ed.), 426; *Haugen v. Albina Light & Water Co.*, 21 Ore. 411, 28 Pac. 244, 14 L. R. A. 424; *Troy Water Co. v. Borough of Troy*, 200 Pa. St. 453, 50 Atl. 259; *State ex rel. Milsted v. Butte City Water Co.*, 18 Mont. 199, 44 Pac. 966, 56 Am. St. 574, 32 L. R. A. 697; *American Water-Works Co. v. State*, 46 Neb. 194, 64 N. W. 711, 50 Am. St. 610, 30 L. R. A. 447. By reason of the public interest, the state or municipality assumes a visitorial control to regulate the price at which water may be sold to the public. 30 Am. & Eng. Ency. Law (2d ed.), 423, 426, 427; 3 Cook, Corporations, § 931; 2 Morawetz, Private Corporations, § 1129; 2 Beach, Private Corporations, § 834 c; *Munn v. Illinois*, 94 U. S. 113, 24 L. Ed. 77; *Olmsted v. Morris Aqueduct Co.*, 47 N. J. L. 311; *Haugen v. Albina Light & Water Co.*, *supra*; *Wiemer v. Louisville Water Co.*, 130 Fed. 251; *Lumbard v. Stearns*, 4 Cush. (Mass.) 60; *Griffin v. Goldboro Water Co.*, 122 N. C. 206, 30 S. E. 319, 41 L. R. A. 240.

DUNBAR, J.—This is an appeal from a judgment for final writ of mandate, entered by the superior court of Pacific county. The action was first brought in the name of the city as plaintiff, but by later stipulation the state was made plaintiff. Stated as briefly as possible, the amended complaint sets forth the granting of a franchise for constructing and operating water works in the city of South Bend, to the appellant—or rather to the South Bend Water Company, to whose rights the appellant succeeded; and it was authorized to build, operate, and maintain water works in the city under such provisions as are generally incorporated in franchises of this character. Among other things, it was required that the water works should be so constructed that the company would be able to furnish and maintain to the city and its inhabitants an adequate supply of pure, wholesome water for domestic, sanitary and manufacturing purposes, and should be able to furnish for fire protection a certain amount, etc. It was also provided that there should

be twenty-five hydrants at stated locations, and that the number of hydrants might be increased. Section 10 of the ordinance stated that the city agreed to use said hydrants at a rental of \$7.50 per hydrant per month, to be paid out of the general fund, and a sufficient tax should be levied and collected annually to make the payments for hydrants rented, which tax should be irrepealable during the franchise. There were other provisions in relation to the right of the city to buy the water works under certain conditions and at certain times, and a provision requiring the grantee to change the then present source of supply when it became impure or inadequate. The complaint, in short, charged that the defendant had violated its franchise duty, and had neglected to furnish an adequate supply of water.

The amended answer admitted the formal allegations of the amended complaint, assignment of franchise to defendant, and its operation and ownership of the plant, and denied all of the substantial charges of failure to give the required service, excepting that for brief periods and sundry times, owing to accident and other causes not due to its fault, there had been interruptions in its mains and stoppages in its supply; but alleged that they had been repaired and restored as rapidly as possible; admitting that a few of the residences had been placed at such an elevation that it was not possible to convey water to them.

For a separate affirmative defense, the defendant pleaded that, in July and August, 1891, negotiations were had with a view to the construction of a system of water works for the city, which was then of about one thousand population; that it was agreed that the city should grant the franchise for thirty years, and that the South Bend Water Company should install and maintain fifty hydrants for fire protection, at the monthly rental of \$7.50 each, and an ordinance to that effect was passed; that the terms of this contract were mutually interdependent and indivisible; that to obtain the necessary capital and comply with the terms of the ordinance

and afford proper security to investors, it was necessary that the company should have some certainty of a substantial income whereby it could meet its expenses of operation and fixed charges; that at that time the assessed valuation of the property of the city was \$2,368,000, and that there was no outstanding debt except a bonded debt of \$60,000; that in reliance on this franchise and the hydrant rental, the company raised the necessary capital by loan and constructed this system; that as originally built it was operated by steam power, the works being partly constructed in 1891-2; that disputes arose between the company and the city as to the company complying with all the terms of the ordinance, litigation ensued, and compromise was agreed to whereby, as a substitute for Ordinance No. 100, the ordinance just above referred to, a new ordinance was passed, in similar terms, except that instead of fifty hydrants the company was to install and receive rent at the same rate for only twenty-five hydrants, with privilege on the part of the city to order an extension of mains, etc.; that the city, in order to pay for the hydrant rental, was to raise money by general taxation. On April 8, 1893, Ordinance No. 118 was passed by the city council as a substitute for said Ordinance No. 100, and the company proceeded with the construction of its system, and installed the twenty-five hydrants by July 7, 1893, and supplied water through its said system to the inhabitants of the city and provided fire protection by means of hydrants.

On July 17, 1893, and until March 1, 1894, the city issued and delivered its warrants for hydrant rental, but none of them has ever been paid. In consequence of the general collapse of credit and decline of business throughout this and other states in 1893 and 1894, the city's business and population were checked, and in 1894, 1895, and 1896, the actual volume of business and population of the city progressively declined, and the assessed valuation progressively fell, while the city's debt rapidly grew. The assessment of June, 1892, was \$1,908,000. In October, 1893, it was \$520,000. The

general city debt in excess of the bonds in October, 1893, was \$21,500, and in 1894, was about \$26,000. The principal of the bonded debt remained unpaid, and part of the accrued interest was unpaid. The assessed valuation of the city at no time since 1894 has exceeded \$1,000,000.

By reason of the default of the city to pay its hydrant warrants, the South Bend Water Company became embarrassed, and a mortgage foreclosure suit in the United States circuit court in 1894 resulted in a receivership, and the receiver for some time operated the property by order of the court. By order of the court he also brought an action against the city to recover the hydrant rentals, and upon a trial on the merits in the United States circuit court in 1895, judgment for the defendant was entered, upon the ground that, although the city was not indebted in excess of its constitutional limit when the franchise by Ordinance 118 was granted, it was so indebted when the hydrant service began in July, 1895, and so remained, and that the city under the state constitution could not incur any indebtedness for hydrant service under said franchise when it was indebted over its constitutional limit. Upon a writ of error to the United States circuit court of appeals from this judgment, it was affirmed. On account of financial embarrassment and decline of income, the South Bend Water Company was reorganized, and this defendant was incorporated by its creditors and principal stockholders in 1895. The franchise and water works were acquired, the motive power was changed from steam to gravity, the original source of water supply was abandoned, and other sources obtained.

Upon the trial of the cause, the court found that the defendant had failed to supply water as alleged in the complaint, in violation of its contract, and the writ of mandate was issued as prayed for. From such order this appeal is prosecuted, the contention being, (1) that there was no obligation on the part of the defendant to comply with the contract, for the reason that the contract made with the city was

an entire contract; and (2) that the trial of the cause resulted in the showing that the defendant, as a matter of fact, had not failed to supply the water required by the ordinances.

On the first question there seems to be a dearth of authority on the particular propositions involved in this case. The appellant recognizes the inapplicability of the authorities generally, but cites as instructive litigation bearing on the principles involved in this case *Winfield v. Winfield Water Co.*, 51 Kan. 70, 32 Pac. 663, and the companion case of *Winfield Water Co. v. Winfield*, 51 Kan. 104, 33 Pac. 714. But the decisions in those cases fail to reach the contested proposition here. In the first case cited, however, as bearing upon the right of the city to bring this action for the benefit of the residents of the city, it is decided that there is no such privity between the private citizen and the water company as would give the citizen a right to compel the company to perform its contract with the city, and further that it is not only the privilege but the duty of the city to compel the water company to furnish the citizens with water in accordance with its contract. This question, however, is set at rest in this case by the intervention of the state, and further by stipulation of the parties that the defendant would raise no objection to the form and nature of the action, and that the case should be tried upon its merits. It must be admitted that the case is beset with difficulties, and that injustice to a certain extent will be inflicted whichever way it may be determined. There is much force in the contention of learned counsel for appellant that this should be construed to be an entire or indivisible contract, and it is urged with reason that the water company had a right to rely upon the performance by the city of its part of the contract, and that such reliance might have been the controlling motive in incurring the obligations binding on the company; and it is argued that, where the considerations moving from each party to the other are practically concurrent, the contract

is indivisible, and that the failure to pay the consideration moving to the public service corporation is therefore a bar to an action for not rendering the service which it is obligated to render under the contract, when the action is brought by the party failing to pay.

This is no doubt the general rule, but peculiar conditions are involved in this transaction, and these conditions must be taken into account. In entering into this contract the city acted in a dual capacity. It acted for the city and stipulated for the protection of the city's property. It also acted as agent for the residents of the city, which, as we have seen, it was its duty to do, the residents as individuals being practically powerless to obtain water, having no control of the streets of the municipality; and the contract for the rental of the hydrants was evidently a contract in the interest of the city as such. But, whether the contract is technically divisible or indivisible, if the theory contended for by appellant should prevail, the residents of the city would be left remediless, because, if the company can violate one part of its contract because of the failure of the city to pay its hydrant rental, it can with perfect impunity violate all of them in whole or in part. It has already lowered its plant one hundred and thirty-two feet, thereby necessarily reducing the altitude of its operations and making the water system ineffectual to a portion of the city which was within its reach before. By the same token it can reduce it one hundred and thirty-two feet more, and still further incapacitate itself. It can violate the ordinances in relation to prices charged, and plead in extenuation the failure of the city to pay its hydrant rentals. It can refuse to supply the residents of the city with pure water for domestic purposes or for any other purpose, except under conditions it sees fit to impose, without restraint or control, until the condition would become intolerable; while at the same time it is operating under the laws governing public service corporations and enjoying special privileges, using and occupying the streets of the

city, protected in such use and occupancy by the franchise which it obtained through this very contract which it now says cannot be enforced against it.

If the city were now seeking to compel the company to furnish water for the operation of the hydrants for fire purposes and to comply with its contract in that respect, while it refused to pay the rental, the position of the appellant would be unassailable; or if the company had abandoned the contract as an entirety when it was breached by the city, and had vacated the streets, we apprehend the city would not have had power to compel the performance of a contract a portion of which it had failed to comply with. But in this case, after it had been judicially determined that the city was powerless to comply, for a time at least, with that part of the contract concerning the hydrant rentals, the company elected to proceed with the contract with that portion eliminated, and it is now estopped from pleading its indivisibility, for it cannot claim the benefit of that portion of the contract which subserves its interest and repudiate that portion which provides for the performance of a duty on its part. By its own act it has placed the construction of divisibility on this contract, and it has operated for many years under this construction. It is elementary that, where there is an ambiguity in the terms of a contract, courts will generally give it the construction placed upon it by the parties to it, especially where they have acted under it for a great length of time, and more especially where, as is shown by the testimony in this case, the water company has frequently promised during all these years to improve the system so that it could furnish water in compliance with the terms of the contract.

On the merits of the case, a careful examination of all the testimony convinces us that the findings of the trial court are fully justified. There being no error committed by the court in the admission or rejection of testimony, or in any other respect, the judgment is affirmed.

RUDKIN, C. J., CROW, MOUNT, and PARKER, JJ., concur.

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Opinion Per MOUNT, J.

[No. 8169. Department Two. December 3, 1909.]

THE STATE OF WASHINGTON, *Respondent*, v. JAMA ARATA,
Appellant.¹

HOMICIDE—INFORMATION—SUFFICIENCY. An information charging that the accused purposely and feloniously etc., did stab and mortally wound, etc., sufficiently alleges that he did the act purposely and feloniously.

CRIMINAL LAW—VERDICT—SUFFICIENCY. A verdict finding the accused guilty of murder in the first degree (for which the penalty is death) and recommending him to the mercy of the court, is not void and does not show doubt in the minds of the jury, the recommendation being merely surplusage.

HOMICIDE—TRIAL—INSTRUCTIONS—DELIBERATION. Upon a prosecution for murder in the first degree, it is error to instruct that there need be no appreciable space of time for deliberation and premeditation.

Appeal from a judgment of the superior court for Kitsap county, Yakey, J., entered February 6, 1909, upon a trial and conviction of murder in the first degree. Reversed.

George Friend and *Milo A. Root*, for appellant.

W. F. Magill, Assistant Attorney General, *Thomas Stevenson*, and *C. D. Sutton*, for respondent.

MOUNT, J.—The appellant was tried and convicted of the crime of murder in the first degree. He appeals from the death sentence.

His counsel argues, first, that the information is insufficient. The information states:

“That the said Jama Arata, in the county of Kitsap, state of Washington, on the 21st day of November, A. D. 1908, then and there being, purposely, feloniously, and of his deliberate and premeditated malice, did kill one Herbert Richards, by then and there purposely, feloniously, and of his deliberate and premeditated malice stabbing, cutting, and

¹Reported in 105 Pac. 227.

mortally wounding said Herbert Richards with a knife which he, the said Jama Arata, then and there held in his hands, contrary," etc.

It is contended that, because the verb "did" follows the words "purposely, feloniously, and of his deliberate and premeditated malice," there is no allegation that the killing was done purposely, etc. There is no merit in this contention. To say that a person purposely and feloniously did an act is to say that he did it purposely and feloniously. There is no difference in the two expressions. Substantially this form of information has been sustained by this court in many cases as charging murder in the first degree. *State v. Cronin*, 20 Wash. 512, 56 Pac. 26, and cases there cited; *State v. Crawford*, 31 Wash. 260, 71 Pac. 1030.

The jury returned a verdict of, "Guilty of murder in the first degree, and further recommend the defendant to the mercy of the court." It is contended that this shows a compromise verdict, and that the jury were not convinced of defendant's guilt beyond a reasonable doubt, because there is but one penalty provided for the offense, which penalty is death where no mercy can be shown. Many reasonable inferences might be drawn from this recommendation, but the fact remains that the jury unanimously found the defendant guilty of the greater crime charged. That finding was the ultimate finding upon the issues tried. The jury were not concerned about the penalty. It was the duty of the court to pronounce the judgment which the law imposed. Such a recommendation was merely advisory, and if the penalty were such that the judge might exercise a discretion in pronouncing sentence, he would not be bound thereby. He might heed the recommendation or not as he saw fit. The recommendation was, therefore, mere surplusage. It did not invalidate the verdict regularly and solemnly rendered. Nor did it necessarily show that there was a doubt in the minds of the jurors as to the guilt of the accused. *State v. Bennett*, 40 S. C. 308; *State v. Potter*, 15 Kan. 302; *State v. Bradley*,

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6 La. Ann. 554; *State v. Newman*, 49 W. Va. 724; *People v. Lee*, 17 Cal. 76.

It is contended that the court erred in instructing the jury upon the question of time necessary for deliberation. Upon this question the court, after defining the different degrees of murder and after defining the meaning of the words "purposely," "deliberately," "premeditation," and "malice," said to the jury:

"I further instruct you that the law knows no specific time within which any intent to kill must be formed so as to make it murder. If the will accompanies the act a moment antecedent to the act itself which caused death, it is as sufficient to make the offense murder as if it were a day or any other time. I further instruct you that the time of deliberation and premeditation need not be long. If it furnishes room for an opportunity for reflection and the facts show that such reflection existed, and that the mind was busy with the design and made the choice with full chance to choose otherwise, there is sufficient deliberation. I further instruct you that to warrant the jury in finding a verdict of murder in the first degree you must find and so indicate in your verdict that the killing was with deliberation and premeditation; that is, that the prisoner conceived intent to kill, that he meditated upon it, and that he formed and afterwards executed the deliberate determination to take life. If the deliberate intent to kill be thus formed and acted upon, it is immaterial how soon after such evil design is formed that it is executed. There need be no appreciable space of time between the formation of the intention to kill and the killing."

This was the whole instruction upon this question, and it is apparent that the instruction was erroneous. While it is correct that the law knows no specific length of time for deliberation and premeditation, and that such time need not be long, it is manifest that there must be some length of time therefor, and that this must be an appreciable length of time. It may be readily understood how a malicious purpose may be formed in an instant without the lapse of any appreciable length of time, and it may be carried into execution immediately without time or opportunity for deliberation or

premeditation. But the words "deliberation" and "premeditation" necessarily imply some appreciable length of time. To deliberate and to meditate upon an act means to think it over and to weigh the consequences, and when there is no appreciable time therefor there can be no deliberation and no premeditation. In *State v. Rutten*, 13 Wash. 203, 43 Pac. 80, this same question was considered and this court there said:

"It seems to us that the language used wipes out the distinction made in the statute between murder in the first and second degree. While no great amount of time necessarily intervenes between the intention to kill and the act of killing, yet, under our statute there must be time enough to deliberate, and no deliberation can be instantaneous; in fact, the idea of deliberation is the distinguishing idea between murder in the first and second degree, and the instructions of the court which we have quoted give exactly that which would be necessary to define murder in the second degree, because the intention to kill must be in the mind of the slayer, and he must do it purposely and maliciously; consequently the act of killing must be preceded by the purpose to kill, and it must be a malicious purpose, and that purpose may be formed instantaneously, or as expressed by the learned court below, 'as instantaneous as the successive thoughts of the mind,' and under the old definition of murder, viz., the unlawful killing of any subject whatsoever through malice aforethought, that would be a proper instruction in regard to murder; but our statute has changed the law in this respect, and has introduced the element of deliberation, and deliberation means to weigh in the mind, to consider the reasons for and against, and consider maturely, to reflect upon,—and while it may be difficult to determine just how short a time it will require for the mind to deliberate, yet, if any effect is to be given to the statute which makes a difference between murder in the first and second degree, the language used by the learned court is too broad."

In *State v. Moody*, 18 Wash. 165, 51 Pac. 356, this rule was again under consideration, and an instruction stating that, "No appreciable space of time need elapse between the forming of such intent and the infliction of the fatal wound,"

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was held error. The cases of *State v. Straub*, 16 Wash. 111, 47 Pac. 227, *State v. Gin Pon*, 16 Wash. 425, 47 Pac. 961, and *State v. Hawkins*, 23 Wash. 289, 63 Pac. 258, were each distinguished from the earlier case of *State v. Rutten*, by reason of the fact that in each of the last-named cases the instruction upon this point provided for an appreciable length of time. In the case at bar, the court said, in substance, the law knows no specific time; if the man reflects upon the act a moment antecedent to the act, it is sufficient; the time of deliberation and premeditation need not be long; if it furnishes room for reflection and the facts show that such reflection existed, then it is sufficient deliberation, and closed the instruction upon this point with the statement: "There need be no appreciable space of time between the formation of the intention to kill and the killing." By these few last words the court destroyed at once all that was good in the entire statement, and gave the jury a rule which this court has frequently held was erroneous. This was reversible error.

Other errors are assigned upon the instructions relating to self-defense and provocation. Some expressions therein may be subject to criticism, but they do not in our opinion constitute reversible error when considered in relation to all the facts in the case, and do not require extended discussion.

On account of the error above pointed out, the judgment is reversed, and the cause remanded for a new trial.

RUDKIN, C. J., DUNBAR, CROW, and PARKER, JJ., concur.

[No. 8323. Department One. December 4, 1909.]

**AUGUSTE ROGER *et al.*, Respondents, v. JOHN W. WHITHAM
et al., Appellants.¹**

MUNICIPAL CORPORATIONS — ASSESSMENTS — SALES — PURCHASE BY CITY ATTORNEY—VALIDITY. A city assessment foreclosure and sale, without notice to the owner, is void when conducted by the city attorney, who made no diligent effort to ascertain the name or address of the owner, and who has, through the instrumentality of a third person, bid in the property at a grossly inadequate price.

SAME. A city attorney is charged as a trustee, as well for the owner of property sought to be charged with the lien of a special assessment as for the city, and is bound to perform his full duty to each.

JUDICIAL SALES—SETTING ASIDE—INADEQUACY. Slight attending circumstances indicating unfairness are sufficient to sustain the discretion of the court in setting aside a sale for a great inadequacy of price.

SAME—DEFENSES. A city attorney cannot bid in property at a public sale conducted by him, and assert equitable defenses against the owner.

ALIENS—EXPATRIATION. Expatriation does not forfeit the right to hold and recover real property.

EQUITY—LACHES—LIMITATION OF ACTIONS. Laches will not bar an action to recover real property where suit is brought within the period of the statute of limitations.

Appeal from a judgment of the superior court for King county, Main, J., entered June 30, 1909, upon findings in favor of the plaintiffs, in an action to set aside a foreclosure sale and to quiet title, after a trial on the merits before the court without a jury. Affirmed.

Charles R. Crouch, for appellants.

Todd, Wilson & Thorgrimson, for respondents.

CHADWICK, J.—On the 9th day of December, 1902, plaintiffs acquired the fee simple title to lot 33, block 74, Gilman

¹Reported in 105 Pac. 628.

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Park, now a part of the city of Seattle, but at all the times hereinafter mentioned a part of the city of Ballard, in King county. In December, 1902, the city council of the city of Ballard passed an ordinance declaring its intention to construct a sewer on Ballard avenue, and such subsequent proceedings were had that an assessment of \$56.90 was levied against the property. The ordinance provided that all assessments should be paid in one payment, and within a limited time, to the treasurer of the city of Ballard. The assessment against lot 33 not having been paid within the time fixed as the date of delinquency, the council directed the city attorney, the defendant John W. Whitham, whom we shall hereafter refer to as defendant or appellant, to bring a suit to foreclose its lien. Service was had by publication, but no copy of the summons or complaint was ever served on plaintiffs, who were at the time, and for several years before that time had been, residing in Paris, France. Judgment was taken, and on the 12th day of November, 1904, the property was bid in by defendant in the name of one E. B. Bodwell, for the sum of \$111.32, that being the amount of the assessment, penalties, interest, and costs. Defendant paid out his own money, intending to acquire title to the property. On December 9 following, Bodwell made a deed to defendant without consideration. The general taxes had been paid by plaintiffs up to and including the year 1904.

In April, 1906, plaintiffs forwarded money through their agent, then residing in San Francisco, to pay the 1905 taxes then due, but the money was returned. After a due season of correspondence, plaintiffs learned that the property was claimed by defendant. About this time defendant discovered that the sale had not been confirmed; whereupon he attended to that detail, and had the sheriff execute another deed to Bodwell, who in turn deeded the property to defendant. The property at the time it was first sold was worth \$3,000, and is now of increased value. Plaintiffs employed an attorney in the spring of 1907. This action was begun on July 21,

1908, after a tender of \$1,000 to cover all taxes and assessments which had been levied upon the property had been refused. There was no suggestion of the lien of the assessment on the county tax rolls. Other pertinent facts will be noticed in our discussion of the law of the case. The trial resulted in a decree in favor of plaintiffs, and defendant has appealed.

Respondents base their claim to reassert title to their property upon two principal grounds; the one, that the assessment was made under the law of 1901, whereas the law of 1891 should have been followed, and for that reason no lien was created; the other, that appellant, in abuse of his trust as city attorney, bought the property at a grossly inadequate price, without exercising due diligence or making such inquiry as might have led to a discovery of the post-office address of respondents, thus insuring notice of the pending suit. The defenses set up are, the validity of the foreclosure proceeding; that respondents are expatriated citizens; that this is a collateral attack upon the judgment; that the action was not begun within the time limited by law, and that respondents have been guilty of laches.

Without discussing the statutes of 1891 and 1901, we think the judgment of the lower court must be sustained upon the second ground urged by respondents. It is the duty of an attorney—and that duty will be laid with heavy hand upon a public officer who becomes a purchaser at a sale conducted by him for the public benefit—to exercise due care, and to pursue such sources of inquiry as are open to him and which may lead to the means of giving notice to the citizen whose property is about to be charged. Appellant cites the rule that any person can purchase at a judicial sale who has no duty to perform in reference thereto inconsistent with the character of a purchaser. But in this case appellant was confronted with a two-fold duty, a duty to the city and a duty to the owner. If the duty is violated, the sale may be avoided at the suit of the party injured.

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While it is a primary rule that mere inadequacy of price, unless so gross as to shock the conscience, is not enough to set aside a judicial sale, it is also true that, when there is a great inadequacy, slight circumstances indicating unfairness will be sufficient to justify a decree setting the sale aside. *Ballentyne v. Smith*, 205 U. S. 285, 27 Sup. Ct. 527, 51 L. Ed. 808. It was there said, and even a cursory review of the authorities will bear out the statement, that "each case must stand upon its own peculiar facts." Now it fairly appears, and although disputed in part by appellant, was found to be the fact by the trial court, that the property stood upon the county assessment roll in the name of W. H. Vernon, a former owner, a resident of Ballard or Seattle, and an acquaintance of appellant. Vernon had formerly been the agent of respondents and he knew their address. At the time of foreclosure there was a notation in figures "47128" on the margin of the tax roll which, if inquired into, would have shown a letter thus numbered, preserved as a file by the county treasurer, and containing the name and address of respondent Auguste Roger, as well as the name of his agent in San Francisco who had paid the taxes. It would seem that the tax rolls would be one of the first sources of inquiry in all cases where a public officer is called upon to ascertain the names of the owners of property which he is undertaking to subject to foreclosure to satisfy a claim of the municipality. While an attorney may purchase at a judicial sale, the fact that he was the attorney directing the sale becomes a challenging circumstance to be considered by the court.

"Such purchase by the attorney, if at a greatly inadequate price, should cause vigilant scrutiny into anything which might affect the fairness or unfairness of the sale." *The Ruby*, 38 Fed. 622.

Such sales are not favored and, with slight attending circumstances, are enough to prompt the discretion of the chancellor.

“The attorney being himself, to some extent, implicated in the management of the sale, must show that it is perfectly fair—that the spirit and true intent of the decree has been complied with, and that due regard has been paid to the interest of all concerned, by making such effort as the circumstances indicate to be fair and reasonable to get the best price that can be procured for the property. And surely if the circumstances demonstrate that a fair and reasonable effort has not been made to get the best price, and that in consequence of this failure, the attorney has been able to make a great speculation with a corresponding loss to the party on the other side, neither the principles of equity nor that policy which consults the stability of judicial sales, and the confidence which should be reposed in them, requires that the attorney should be confirmed in his speculation, and especially if the disaffirmance of the sale could be attended with no injury, not even the injury of delay to the party to whose benefit the sale is decreed.” *Busey v. Hardin*, 2 B. Mon. (Ky.) 407, 410.

See, also, *Burke v. Daley*, 14 Mo. App. 542; *Clute v. Barron*, 2 Mich. 192; *Shroeder v. Young*, 161 U. S. 334, 16 Sup. Ct. 512, 40 L. Ed. 721. And we may add to the quotation, that an equal duty was upon the attorney to locate the owner if possible. A public officer, especially a city attorney, owes the same duty to the citizen that he owes to the municipality. He acts to some extent in the character of a trustee. In this connection we indorse the utterance of the supreme court of Arkansas, in speaking of the right of an attorney for an administrator to purchase at his own sale:

“The doctrine has been extended to all persons entrusted with the management and direction of sales, in such manner as to impose upon them the duty of taking care that the property may be sold to the best advantage for all concerned. They cannot purchase at all, however fair their intentions. As purchasers their interests would conflict with their duties, and the courts of equity, regarding the weakness of ordinary men, takes from them all temptations by rendering them incapable of purchasing at all.” *West v. Waddill*, 33 Ark. 575, 587.

And also the case of *Wright v. Walker*, 30 Ark 44, where

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the remark of Lord Thurlow, in *Hull v. Hallett*, 1 Cox 134, that: "No attorney can be permitted to buy in things in a course of litigation of which he has the management. This the policy of justice will not endure," is adopted. Although the English rule in all its strictness has been modified to the extent that an attorney may become the purchaser, his right is not absolute. Its limitations are defined in the case of *Merritt v. Graves*, 52 Wash. 57, 100 Pac. 164. In that case Judge Rudkin traces the line of demarkation at that point where there is no legal or moral duty to protect the interests of the parties concerned. In this case there was both a moral and legal duty upon appellant, a public officer, appointed and directed to make the sale. In such cases all the books agree that the sale can be avoided if he undertakes to enlarge his compensation or fatten the emoluments of his office by speculations nourished in the hope of personal gain. The cases to sustain this proposition are too numerous to be cited here. They are collected in 17 Am. & Eng. Ency. Law, p. 964, and 24 Cyc. 29, to which may be added *Coughlin v. Holmes*, 53 Wash. 692, 102 Pac. 772.

Speaking to the defenses interposed, the complaint and proofs are ample to charge defendant as a trustee; the question of collateral attack thus becomes immaterial. No rule of law has been cited, nor do we know of any, that will forfeit the property of the citizen who for any reason becomes expatriated. The action was begun within the period of limitation, and unless there be some controlling equity, the court will not conjure the doctrine of laches to defeat or destroy a statute fixing a time within which actions may be brought. *Cordiner v. Finch Investment Co.*, 54 Wash. 574, 103 Pac. 829.

The judgment is affirmed.

RUDKIN, C. J., FULLERTON, and GOSE, JJ., concur.

MORRIS, J., took no part.

[No. 8046. Department Two. December 6, 1909.]

**EDITH KRIEG, *Respondent*, v. JAMES HAMILTON LEWIS *et al.*,
Appellants.¹**

PUBLIC LANDS—HOMESTEAD—TITLE—WHAT LAW GOVERNS. While the laws of the United States control the ownership until title passes, after the patent to government land is issued, it becomes subject to state legislation, and the state, in passing the community property law and providing the rule of descent, is not acting in contravention of the laws of the United States.

HUSBAND AND WIFE—COMMUNITY PROPERTY—DESCENT AND DISTRIBUTION—PUBLIC LANDS—HOMESTEAD. A homestead, patent for which was issued to a married man, is community property, and upon the subsequent death of the wife, leaving one child, an undivided one-half interest descends to the child.

Appeal from a judgment of the superior court for San Juan county, Joiner, J., entered January 6, 1909, upon findings in favor of the plaintiff, in an action for partition and to quiet title, after a trial before the court without a jury. Affirmed.

James B. Howe, for appellants.

L. J. Irwin and *Marion Edwards*, for respondent.

DUNBAR, J.—The material findings of fact, which are not excepted to, and on which this appeal is based, are briefly as follows: Martin Phillips and his wife Ellen were married in the year 1872, and plaintiff, their only child, was born August 13, 1884. Said Phillips, with his wife, about January 19, 1882, settled and took up his residence on the land in controversy in this action while the land was a part of the public domain, for the purpose of making the same their home and acquiring title thereto under the homestead laws of the United States, and they continued to reside upon said lands and cultivated the same until the year 1888. On Jan-

¹Reported in 105 Pac. 483.

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uary 19, 1882, Phillips filed his application to enter said lands as a homestead; complied with the homestead laws of the United States, and on November 9, 1883, commuted his homestead entry by making cash payment, and at the same time made the necessary proof of settlement, residence, and cultivation, and received his final homestead certificate. On June 20, 1884, patent to said lands from the United States was issued to said Phillips under the homestead laws. On February 24, 1888, while Phillips and his wife were still residing upon said lands, the said Ellen Phillips died intestate, leaving surviving her her said husband, Martin Phillips, and her child, Edith Phillips, plaintiff in this action, but no other child or descendant of any other child. Thereafter the said Martin Phillips married his second wife, Susan Phillips, and on the 15th day of May, '1890, said Martin Phillips and Susan Phillips, by deed of conveyance, dated and acknowledged May 15, 1890, conveyed to the defendant James Hamilton Lewis the lands in controversy in this action. The said James Hamilton Lewis has since married the defendant Rose L. Lewis.

Upon these facts, the court found, as conclusions of law, that the plaintiff Edith Phillips was entitled to a decree declaring that she was the owner of an undivided one-half interest in the above described land, subject to the lien in favor of the defendant James Hamilton Lewis for one-half of the amount of taxes which he had theretofore paid, with interest thereon, and that plaintiff is entitled to have said lands partitioned and her share thereof set off and allotted to her in severalty, subject to the lien of said James Hamilton Lewis for said taxes and interest aforesaid. The defendants excepted to the conclusions of law, and appealed from the judgment rendered.

It is contended by the appellants that the error of the superior court consisted in assuming that the title, conveyed by the patent of the United States to the father of the respondent, depended upon the laws of the state of Washing-

ton instead of upon the laws of the United States. If such construction as this were placed upon the laws by the superior court, it was evidently a wrong construction. But such is not the case, nor was this the question at issue. It was decided in *McCune v. Essig*, 199 U. S. 382, 26 Sup. Ct. 78, 50 L. Ed. 237, which case is relied upon by appellants, that the interest which arises in an entryman by his entry, who can fulfill the conditions of settlement and proof in case of his death, and to whom the title passes, depended upon the laws of the United States and not upon the state laws. But it was also decided in that case, sustaining the doctrine announced in *Wilcox v. Jackson*, 13 Pet. 498, 10 L. Ed. 264, that whenever the question is whether title to land which had been the property of the United States had passed, that question must be resolved by the laws of the United States; but that, whenever according to those laws the title shall have passed, then, like all other property, it is subject to state legislation. In that case the plaintiff was the daughter of a deceased homestead settler, who died shortly after the homestead entry and long before the time elapsed for final proof and before final proof or issuance of patent, the claim in that case being that the patent related back to the homestead filing, and the doctrine of relation was denied by the supreme court in that case.

But the other doctrine is just as firmly announced, viz., that, when the title shall have passed under the laws of the United States, it is then subject to state legislation. In that case it will be noticed that there was no community in existence at the time the proof was made and patent issued, for the community had been dissolved by the death of one of the spouses. But in this case, by virtue of the laws of the United States, title passed while the community was in existence. The United States had no further concern in relation to the title of the property after it had established it in the person to whom it was entitled under the laws of the United States, and when that was done the laws of the state operated upon

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the property, and the legislature was not in any way acting in contravention of the laws of the United States when it undertook to regulate it and determine its ownership.

The cases from this court cited by the appellants, viz: *Hall v. Hall*, 41 Wash. 186, 83 Pac. 108, 111 Am. St. 1016, and *Cunningham v. Krutz*, 41 Wash. 190, 83 Pac. 109, 7 L. R. A. (N. S.) 967, simply follow the rule laid down in *McCune v. Essig*, *supra*, and the facts in those cases brought them within the rule there announced, the patent having issued after the dissolution of the community. This question has been gone into at length by the cases just cited, so that it will not be necessary to discuss again the principles there announced.

The judgment will be affirmed.

RUDKIN, C. J., PARKER, MOUNT, and CROW, JJ., concur.

[No. 8300. Department Two. December 6, 1909.]

OLYMPIC OIL COMPANY, *Respondent*, v. M. FRANCIS KANE
et al., *Appellants*.¹

TRIAL—DECISION—TIME FOR RENDITION. The superior court does not lose jurisdiction by failing to decide a cause within ninety days from the time it is submitted, as required by the constitution.

ELECTION OF REMEDIES—RECEIVERS—TRIAL OF TITLE TO PROPERTY—WAIVER OF OBJECTIONS. Where, upon an order to show cause, the parties appeared in a receivership matter, and by consent tried out a question of title, upon pleadings filed, the right to litigate the title in an independent action is waived.

Appeal from an order of the superior court for King county, Morris, J., entered December 18, 1908, for the payment of assets to a receiver, after a hearing upon an order to show cause. Affirmed.

James C. Moody, for appellants.

McBurney & Cummings, for respondent.

¹Reported in 105 Pac. 477.

PARKER, J.—This is an appeal from an order of the superior court requiring appellants to pay over to the receiver of the Wayne Automobile Agency, a corporation, the sum of \$750 claimed by the receiver to be a part of the assets of that corporation. So far as necessary to be noticed, the facts appearing from the record are as follows: The appellant Francis M. Kane is the president and general manager, and the appellant Ida M. Kane, his wife, is the secretary and treasurer of said corporation, and have at all times since its organization had the entire management and control of its business and affairs. In January, 1908, by order entered in this cause, Frank Brightman was appointed receiver of the corporation, and as such became entitled to the possession of all its property and assets. On May 15, 1908, the receiver filed in this cause his petition, alleging, in substance, that at the time of his appointment as such receiver there was pending in the superior court of King county a suit in the name of appellants, as plaintiffs, against Z. E. Foster, defendant, seeking to recover the sum of \$1,000 as a balance due on the purchase price of an automobile, sold by the corporation to Foster; that on the 15th day of May, 1908, said suit was compromised and settled by appellants with Foster by the payment to appellants of the sum of \$750 in cash, and that the same belongs to the receiver as a part of the assets of the corporation, which he demanded from them, and that they refused to pay the same over to him; upon which facts he prayed for an order of court directing appellants to pay over to him said sum of \$750, or to show cause, at a time and place to be fixed, why they should not be required to do so. Thereupon the court issued its order to show cause accordingly, and in pursuance thereof on the 1st day of June, 1908, the matter came on for hearing before the court. So far as appears from this record, no answer or pleading was filed in response to this petition until long after the hearing and the court's order thereon, but evidence was introduced in behalf of all parties, upon the theory that appellants were

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claiming that there was another suit pending by which the receiver was seeking to recover from them this same money, and also that it was their own property, as if they had tendered these issues by formal answer, which issues were thereafter tendered by formal answer, apparently for the purpose of making the record complete.

At the conclusion of all the evidence, counsel for appellants moved to dismiss the petition and proceeding upon the ground that the evidence showed another suit was pending involving the same issues, and also upon the ground that the evidence upon the merits was not sufficient to warrant the court in directing them to pay over the money to the receiver as part of the assets of the corporation. Thereupon the court took the matter under advisement, and on the 18th day of December, 1908, decided the matter favorably to the receiver, and ordered that the appellants, within twenty days thereafter, pay to the receiver, or into the registry of the court for his benefit, the said sum of \$750; from which order this appeal is taken.

It is contended by learned counsel for appellants that the lower court was without jurisdiction to render the decision appealed from, for the reason that more than ninety days had elapsed since the submission of the cause. This contention is without merit, having been decided to the contrary in the case of *Demaris v. Barker*, 33 Wash. 200, 74 Pac. 362.

It is next argued in behalf of appellants that the court was without jurisdiction in this cause to determine the controversy here involved, and that their rights in the premises cannot be determined except by an independent action commenced and prosecuted against them. We think, however, in view of the fact that they consented to the hearing and determination of the matter by the superior court in the receivership cause, they thereby waived their right to have the matter litigated in an independent action, unless it can be said they did not waive this right in view of their contention and offer of evidence touching the then pendency of another

action involving the same issues. Upon this question however we think the evidence fails to show that there was another action pending involving the recovery from them by the receiver of this money. The only evidence of another suit related to one commenced a considerable time prior to the payment of this money to appellants.

Upon the merits there is nothing but questions of fact involved, and from a careful reading of all the evidence in the record we conclude that the learned superior court was fully warranted in finding that the money in the hands of appellants belonged to and was a part of the assets of the corporation, and that the receiver was therefore entitled to the same. We conclude that the superior court correctly disposed of the issues involved, and its judgment and order is therefore affirmed.

RUDKIN, C. J., DUNBAR, MOUNT, and CROW, JJ., concur.

[No. 8396. Department Two. December 6, 1909.]

MAX GUTTER, *Appellant*, v. F. L. JOINER *et al.*,
Respondents.¹

ATTACHMENT—WRONGFUL ATTACHMENT—ACTION ON BOND—WAIVER BY REDELIVERY. Defendant's retaking of attached property upon a redelivery bond, without moving against the writ, waives the right of action for wrongful attachment upon the attachment bond (PARKER and DUNBAR, JJ., dissenting).

Appeal from a judgment of the superior court for King county, Tallman, J., entered May 11, 1909, dismissing an action in tort, upon sustaining a demurrer to the complaint. Affirmed.

H. E. Foster, for appellant.

Holzheimer, Herald & Holzheimer, for respondents.

¹Reported in 105 Pac. 457.

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MOUNT, J.—The appellant brought this action to recover alleged damages upon an attachment bond. The lower court sustained a demurrer to the complaint and dismissed the action. Plaintiff appeals.

It appears from the complaint that the respondent Joiner brought an action for alleged debt against the appellant. In that action a writ of attachment was issued, upon the ground that the defendant was a nonresident. After service of the writ, the defendant appeared in that action and, without moving against the attachment, gave a redelivery bond and regained possession of the attached property. A judgment was subsequently rendered in that action in favor of the defendant. Thereafter he brought this action. The question is, does the giving of a redelivery bond in such cases waive the right of action upon the attachment bond? This court, in *Brady v. Onffroy*, 37 Wash. 482, 79 Pac. 1004, in considering the effect of a redelivery bond under our statute, said:

“The giving of the bond effects the immediate discharge of the attachment and release of the property, and the bond then becomes a security for any judgment that shall be rendered against the defendant. The cases hold that, when such a bond has been given under a statute requiring an unconditional promise to perform the judgment of the court, the defendant is thereby estopped to raise any question as to the regularity of the attachment.”

After citing cases and discussing the provisions of the statute, the opinion concludes:

“Therefore, under our law, a defendant in attachment has the option to first try the question of the regularity of the attachment, or to give the bond. If he elects to give the bond, which under our statute must provide for the performance of the judgment of the court, he thereby gains the advantage of an immediate release of the property and discharge of the attachment. But, in lieu thereof, under the above authorities, the bond stands as security for any judgment that may thereafter be rendered against him in the

action, and both he and his surety waive any right to attack the regularity of the attachment."

While the main question in that case was not the same as here, we think the rule there stated is sustained by the authorities cited, to which may be added, *Bick v. Long*, 15 Ind. App. 503, 44 N. E. 555; *Pirley v. Reed*, 26 Minn. 80, 1 N. W. 800, and 4 Cyc. 687, and is conclusive of the question in this case.

The judgment is therefore affirmed.

RUDKIN, C. J., and CROW, J., concur.

PARKER, J. (dissenting)—I cannot concur in the holding of the majority opinion, to the effect that a defendant in whose favor a judgment has been rendered *upon the merits*, in an action brought against him to recover an alleged debt wherein the plaintiff has given the usual bond and caused an attachment to be issued and property of the defendant seized thereunder, waives his right to sue upon the attachment bond for actual damages resulting to him from such seizure, by the giving of a redelivery bond and thereby recovering possession of his property.

In my opinion the authorities cited, as well as the numerous citations in *Brady v. Onffroy*, 37 Wash. 482, 79 Pac. 1004, go no farther than to support a holding to the effect, that when a redelivery bond is given, the defendant and his sureties thereby waive the right to question the attachment proceedings in *that case or in any proceeding wherein a judgment rendered against defendant in that case is sought to be enforced*. But it does not follow that when the defendant successfully resists plaintiff's claim upon the merits and judgment is rendered accordingly, as is here alleged, he has waived actual damage caused by the seizure under the attachment, by the giving of redelivery bond and reclaiming his property.

The theory of the decisions seems to be that, if the defendant has any cause to show why the attachment should

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not have been sued out, he should present it in some form, by motion or otherwise, in the attachment suit, before giving a redelivery bond, which is a voluntary substitute for the attachment. No doubt this is sound as applied to all lawful objections to the attachment then available to the defendant, but a motion to discharge an attachment cannot be supported by denying the existence of the debt; that goes to the merits of the cause and of necessity can only be determined upon the trial. Nothing, it seems could more conclusively show that the attachment was wrongfully sued out than a judgment against the plaintiff upon the merits (4 Cyc. 835); yet until trial upon the merits the defendant has no means of showing that there is no debt upon which the attachment is based. The defendant may be greatly damaged by the seizure (though whether much or little does not affect the principle involved) before he secures the return of his property through a redelivery bond, and he is not limited as to the time of so reclaiming his property, save by the rendering of a judgment against him. There is sound reason for holding that the giving of a redelivery bond is in effect an admission of the regularity of the attachment so far as defenses to *the attachment proceedings* then available to defendant are concerned. But it certainly cannot be said that the giving of a redelivery bond is a waiver of all actual damage on account of the wrongful attachment, when such wrongfulness results from the nonexistence of the debt alleged as a basis of the attachment, when such fact cannot be invoked to show the wrongful suing out of the attachment until the original suit has been determined in defendants' favor upon the merits. I therefore dissent.

DUNBAR, J., concurs with PARKER, J.

[No. 8253. Department One. December 7, 1909.]

**EUGENE D. LINDSAY *et al.*, Appellants, v. J. C. SCOTT *et al.*,
Respondents.¹**

APPEAL—NOTICE—TIME FOR TAKING—NOTICE OF JUDGMENT. The time for taking an appeal from a final judgment runs from the date of the entry of the judgment, and appellant is chargeable with notice of the date.

APPEAL—STATEMENT OF FACTS—TIME FOR FILING. The time for filing a proposed statement of facts runs from the entry of judgment.

TRIAL—NOTICE OF FINDINGS AND JUDGMENT—EXCEPTIONS—TIME FOR TAKING. Notice of the findings and entry of judgment need not be given, as exceptions may be taken until five days after notice is received.

APPEAL—REVIEW—VACATION OF DECREE—DISCRETION. The denial of a motion to vacate findings and a decree will not be reviewed where no abuse of discretion is shown.

Appeal from a judgment of the superior court for Snohomish county, Black, J., entered November 25, 1908, upon findings in favor of the defendants, in an action to quiet title, after a trial on the merits. Dismissed.

S. J. White, for appellants.

Hulbert & Husted, for respondents.

RUDKIN, C. J.—This was an action to quiet title to certain lands in Snohomish county. On the 25th day of November, 1908, final judgment was entered in favor of the defendants. On February 27, 1909, the plaintiffs moved the court to vacate the findings of fact, conclusions of law, and judgment, on the ground that the plaintiffs had no notice of the signing thereof, and were denied the benefit of exceptions thereto. On April the 7th, 1909, this motion was denied, and on the same day exceptions to the findings of fact upon which the final judgment was based were filed. On

¹Reported in 105 Pac. 462.

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April 24, 1909, a proposed statement of facts on appeal was filed. On May 29, 1909, notice of appeal from the final judgment, and also from the order denying the motion to vacate the findings of fact, conclusions of law, and judgment, was given.

Respondents have moved to dismiss the appeal and to strike the statement of facts, because the appeal was not prosecuted within the time limited by law, because the statement of facts was not filed within the time limited by law, and because the exceptions to the findings of fact were not filed within the time limited by law. The motion to dismiss the appeal from the final judgment and the motion to strike the statement of facts must be granted. The ninety days allowed by law for prosecuting an appeal from a final judgment commences to run from the date of the entry of the judgment, and the appellant is chargeable with notice of that date. In other words, the time is fixed absolutely by statute and runs independent of any question of notice to parties desiring to appeal. Bal. Code, § 6502; *National Christian Ass'n v. Simpson*, 21 Wash. 16, 56 Pac. 84. The time for filing a proposed statement of facts or bill of exceptions begins to run from the same date. Bal. Code, § 5062.

With the appeal from the final judgment dismissed and the statement of facts stricken there is nothing before us to review. The appellants were not entitled to notice of the time and place of signing the findings of fact, conclusions of law, or judgment, as a matter of law, nor were they deprived of the benefit of exceptions for want of notice. The right to except continues until the lapse of five days after notice of the filing of the findings, under the express terms of the statute, and repeated rulings of this court. Bal. Code, § 5052. *Kinkade v. Witherop*, 29 Wash. 10, 69 Pac. 399; *Mann v. Provident Life & T. Co.*, 42 Wash. 581, 85 Pac. 56.

And if we assume that the order denying the motion to vacate the findings of fact, conclusions of law, and judgment is appealable, and that the appeal was prosecuted within the

time limited by law, the appeal presents no question subject to review here. The motion was addressed to the discretion of the trial court and no abuse of discretion is shown. Appeal dismissed.

FULLERTON, GOSE, MORRIS, and CHADWICK, JJ., concur.

[No. 8355. Department Two. December 8, 1909.]

**YAKIMA GROCERY COMPANY, *Appellant*, v. ZELIA BENOIT
et al., *Respondents*.¹**

APPEAL—REVIEW—EXCEPTIONS. One general exception to findings of fact is insufficient to bring up for review any question upon the evidence, even in an equitable case, where findings were made.

SAME—TRIAL—FINDINGS AND CONCLUSIONS—SUFFICIENCY. A finding that a claim against an insolvent estate is based upon a certain promissory note made and executed by the insolvent for a valuable consideration, is a finding of fact and not a conclusion of law, and must be excepted to, to be reviewed on appeal.

APPEAL—RECORD—STRIKING STATEMENT—DISMISSAL. Upon striking a statement of facts for want of any exceptions to the findings, the appeal will be dismissed, when no questions are raised outside of the statement.

Appeal from a judgment of the superior court for Yakima county, Preble, J., entered April 8, 1909, upon findings in favor of the defendants, establishing claims against an estate, after a hearing before the court without a jury. Dismissed.

Hull & Livesey, for appellant.

Englehart & Rigg, for respondents.

DUNBAR, J.—Claims by Zelia Benoit and George Benoit and others, against the estate of Lambert Benoit, insolvent, were filed in the matter of the assignment of Lambert Benoit for the benefit of creditors. Exception to the claims of Zelia Benoit and George Benoit were filed by the respondent Yaki-

¹Reported in 105 Pac. 476.

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ma Grocery Company, a corporation. Notwithstanding the exceptions, the court found that the claims were legal and just claims, and judgment was entered accordingly, and from that judgment this appeal is taken.

The respondents move for an order to strike the statement of facts and affirm the judgment, for the reason that there are no exceptions to the findings of fact, or any of them, as required by law. After the findings of fact, the exception was as follows: "To all of which plaintiffs except, and their exception is allowed." This court has held, in an unbroken line of authority from *Rice v. Stevens*, 9 Wash. 298, 37 Pac. 440, to *Fender v. McDonald*, 54 Wash. 130, 102 Pac. 1026, that such exceptions are insufficient to bring up for review any question upon the evidence; and although it has been held that findings of fact in an equitable case are not necessary, we have as universally held that, where findings have been made, they must be excepted to. However, it is earnestly contended by the counsel for appellant that, conceding this to be the law, the findings in this case were really not findings of fact, but were in effect conclusions of law. With this contention we are unable to agree. Some of the findings may have been somewhat in the nature of conclusions of law, as they frequently are; but the finding that the claim of George Benoit against the estate was based upon a promissory note, made and executed by the said Lambert Benoit to the said George Benoit for a valuable consideration, is certainly a finding of fact. This was the essential fact that was the subject of the controversy, viz., whether the execution of the note was for a valuable consideration. The same finding was found in relation to the claim of Zelia Benoit.

Under the authorities above referred to, the statement of facts will be stricken, and as there are no questions raised outside of the statement of facts, the appeal will be dismissed.

RUDKIN, C. J., CROW, MOUNT, and PARKER, JJ., concur.

[No. 8241. Department Two. December 8, 1909.]

AMERICAN RADIATOR COMPANY, *Appellant*, v. Roy J.
KINNEAR *et al.*, *Respondents*.¹

CORPORATIONS—OFFICERS—LIABILITY FOR DEBTS. The liability of officers for corporate debts depends upon statutory provisions or the legal existence of the corporation.

CORPORATIONS—EXISTENCE—CONTRACTS—SUBSCRIPTION TO STOCK—NECESSITY. Subscription to the capital stock of a corporation is not essential to its legal existence or liability on its contracts.

CORPORATIONS—CONTRACTS—AUTHORITY OF OFFICERS. The recovery of judgment against a corporation on contract is conclusive that the officers had authority to make the contract.

CORPORATIONS—CONTRACTS—TRANSACTIONING BUSINESS PRIOR TO SUBSCRIPTION TO STOCK. The transaction of business by a corporation before all of its capital stock is subscribed, contrary to Laws 1895, p. 338, does not render its contracts void; since only the state can complain of violation of the statute.

SAME—LIABILITY OF OFFICERS. The transaction of business by a corporation before all of its capital stock is subscribed, contrary to Laws 1895, p. 338, does not render its officers individually liable for the debts upon the insolvency of the corporation, since the liability of officers is restricted to certain other cases by Bal. Code, §§ 4265, 4266, etc.

SAME—CONTRACTS—ESTOPPEL. A person dealing with a *de facto* corporation is estopped to deny its corporate capacity.

Appeal from a judgment of the superior court for King county, Albertson, J., entered May 20, 1909, upon sustaining a demurrer to the complaint, dismissing an action to hold the officers of an insolvent corporation individually liable for its debts. Affirmed.

Warren H. Lewis, for appellant.

W. Lair Hill and *George E. de Steiguer*, for respondent Bussell.

Roberts, Battle, Hulbert & Tennant, for respondents Kinneare *et al.*

¹Reported in 105 Pac. 630.

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Opinion Per RUDKIN, C. J.

RUDKIN, C. J.—While the complaint in this case is somewhat voluminous the material facts are as follows: In December, 1906, articles of incorporation of the Yule Spinning and Twine Manufacturing Company were executed, in triplicate, and copies thereof filed in the office of the secretary of state and in the office of the county auditor of King county, as prescribed by law. The capital stock of the corporation was fixed at the sum of \$100,000, divided into 1,000 shares of the par value of \$100 each. Not to exceed \$80,000 of the capital stock was subscribed at the time the corporation commenced business, and not to exceed one-half of the capital was subscribed at any time thereafter. On the 15th day of January, 1908, the plaintiff sold and delivered certain goods to the corporation, of the value of \$432.93, on sixty days credit. The goods were not paid for, and the plaintiff recovered judgment against the corporation for the purchase price. An execution issued on the judgment was returned unsatisfied and the corporation is insolvent.

After the return of the execution, this action was instituted against the defendants as officers and trustees of the corporation to recover the amount of the judgment. The complaint charges fraud against the defendants, but the charge is a mere legal conclusion, arising from the fact that the defendants commenced and transacted business for and in the name of the corporation before the whole amount of its capital stock was subscribed, contrary to the act of March 20th, 1895, Laws of 1895, p. 338, which provides, "That no such corporation shall commence business or institute proceedings to condemn land for corporate purposes until the whole amount of its capital stock has been subscribed." A demurrer to the complaint was sustained, and the plaintiff electing to stand on its pleading and refusing to plead further, a judgment of dismissal was entered, from which this appeal is prosecuted.

The appellant contends that it is entitled to recover against the respondents on three grounds; first, under the maxim,

"Where there is a right there is a remedy;" second, on the ground that the respondents are individually liable as partners; and, third, on the ground that the respondents exceeded their authority as agents for the corporation. For convenience we will consider the second and third grounds first, if indeed, the one is not a corollary of the other.

Cases may be found where officers of corporations have been held individually liable to the corporation creditors, because the capital stock of the corporation was not subscribed, but these cases rest either upon an express statute imposing individual liability in such cases, or upon the ground that there is no corporation until the capital stock is subscribed. In *First Nat. Bank of Salem v. Almy*, 117 Mass. 476, and *Cummings v. Winn*, 89 Mo. 51, cited by the appellant, the liability was based upon an express statute, and similar statutes exist in many of the states. In *Walton v. Oliver*, 49 Kan. 107, 30 Pac. 172, 33 Am. St. 355, and *Wechselberg v. Flour City Nat. Bank*, 64 Fed. 90, individual liability was upheld on the ground that there was no corporation to be bound. These decisions are not controlling here, for our statute does not impose individual liability in express terms, and subscription to the capital stock is not essential to the legal existence of a corporation. *Spokane v. Amsterdamsch Trustees Kantoor*, 22 Wash. 172, 60 Pac. 141. For the like reason *Farmers Co-operative Trust Co. v. Floyd*, 47 Ohio St. 525, 26 N. E. 110, 21 Am. St. 846, 12 L. R. A. 346, and other like cases, basing liability on excess of authority of corporate agents are inapplicable, for if the corporation is bound there is no excess of authority. The very fact that the appellant recovered judgment against the corporation affords conclusive evidence that the trustees in contracting the debt did not exceed their authority.

For these reasons, there is no liability on the part of the respondents in the present case, unless their liability is fixed by the mere act of transacting business before the whole capital stock was subscribed. While there is some conflict of au-

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thority on this question the weight of authority denies individual liability in such cases, holding that the state alone may complain of the violation of its laws. Thus, in *Whitney v. Wyman*, 101 U. S. 392, 25 L. Ed. 1050, it was claimed that a certain corporation contract was void, because entered into before the articles of association were filed, in violation of a statute, but the court said:

“The corporation having assumed by entering into the contract with the plaintiff to have the requisite power, the parties are estopped to deny it. . . . The restriction imposed by the statute is a simple inhibition. It did not declare that what was done should be void, nor was any penalty prescribed. No one but the state could object. The contract is valid as to the plaintiff, and he has no right to raise the question of its invalidity.”

In *Snider's Sons' Co. v. Troy*, 91 Ala. 224, 8 South. 658, 24 Am. St. 887, 11 L. R. A. 515, the court said:

“Maintenance of such suit involves judicial nullification of franchises and powers enjoyed and exercised by a *de facto* corporation, as a distinct entity recognized by the law, acquiesced in by the state; defeats the corporate character of the contract, changes the relation from that of stockholders to that of partners; substitutes other and new parties to the contract, and effects the imposition of an enlarged liability, which they did not assume, but intended to avoid; so understood by the creditor, when he contracted the debt with the corporation as such. The contract is valid and binding on the corporation, which the creditor trusted. No injustice is done him, for all his rights and remedies are preserved by the principle that the corporation and the share-holder are estopped from denying its legal existence, as against him. It will not answer to say that he is not repudiating, but enforcing, the contract. He repudiates the party—the corporation—with which he made the contract, and seeks its enforcement against parties who never entered into contractual relations with him.

“The doctrine that a creditor who has dealt with a *de facto* corporation, in its corporate capacity, cannot charge the stockholders as partners with the corporate debt, there being no fraudulent intent alleged and proved, seems to us to be sus-

tained by the weight of authority, maintained by stronger reasoning, consistent with well-settled principles, and in harmony with the policy of the state."

Our own statute tends to support this conclusion. Title 23, chapter 1, Ballinger's Code, relating to the organization and management of private corporations, fixes the liability of stockholders; section 4266 imposes individual liability on trustees in certain cases; and section 4265 expressly declares that the corporations organized thereunder, and the members thereof, shall be subject to the conditions and liabilities therein imposed and to none others. See section 4250, amended by the act of 1895, p. 338. This statute leaves little room for implication.

For these reasons, the demurrer was properly sustained and the judgment is affirmed.

DUNBAR, MOUNT, CROW, and PARKER, JJ., concur.

[No. 8469. Department Two. December 9, 1909.]

THE STATE OF WASHINGTON, *on the Relation of F. G. McIntosh et al., Plaintiff, v. THE SUPERIOR COURT FOR PACIFIC COUNTY et al., Respondents.*¹

EMINENT DOMAIN—PETITION—SUFFICIENCY—ALLEGING PUBLIC USE. A petition to condemn a right of way for a railroad alleging that, when constructed, it will be a common carrier of passengers, is not demurrable for failure to allege that the land will be devoted to a public use.

SAME—RAILROAD—PRIVATE PURPOSES. A railroad may condemn land in aid of its public purposes only, although it is also authorized to engage in private business.

SAME—CONDITIONS PRECEDENT—BRIDGE OVER NAVIGABLE STREAM. The consent of the War Department to bridge a navigable stream is not a condition precedent to the condemnation of a railroad right of way crossing the stream.

¹Reported in 105 Pac. 637.

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SAME—DEFENSES—LACHES. Laches in failing to build its line is no defense to a proceeding by a railroad company to condemn land, where it is about to utilize the property and is fully authorized.

SAME—DEFENSES—EXTENT OF USE. That a railroad line is but 6½ miles long is not a defense to a proceeding to condemn its right of way.

SAME—CONDITIONS PRECEDENT—SUBSCRIPTION TO STOCK. A subscription to the capital stock of a railroad company by trustees is sufficient to authorize it to exercise the right of eminent domain, especially where the stock is all paid in.

SAME—STOCK—RAILROAD—PUBLIC PURPOSE. The fact that the stock of a railroad company is held by individuals or a corporation having a special interest in the construction of the road does not affect the public character of the road.

CORPORATIONS—STOCK HELD BY OTHER CORPORATION. Laws 1905, p. 51, authorizing corporations to own and hold stock in other corporations is constitutional.

Certiorari to review an order of the superior court for Pacific county, Mitchell, J., entered November 2, 1909, declaring a public use and necessity in condemnation proceedings, after a hearing on the merits before the court without a jury. Affirmed.

Flaskett & McMenamin, for relators.

Welsh & Welsh, for respondents.

RUDKIN, C. J.—This is a proceeding to review an adjudication of public use and public necessity in a condemnation case.

The relator first contends that the petition for condemnation does not state facts sufficient to constitute a cause of action because it does not allege that the land sought to be taken will be devoted to a public use. True the petition does not contain these words, but it does allege that the company is organized to construct and operate a line of railroad from South Bend to Chehalis in this state, and will be, when the road is constructed, a common carrier of passengers and freight for hire. This clearly shows that the contemplated use is a public one.

It is next contended that while the company is authorized to construct and build railroads, it is also authorized to engage in private business. Conceding this to be true, the company may condemn and appropriate land in aid of its public purposes for public uses only. *State ex rel. Harlan v. Centralia-Chehalis Elec. R. & P. Co.*, 42 Wash. 632, 85 Pac. 344, 7 L. R. A. (N. S.) 198; *State ex rel. Harris v. Olympia L. & P. Co.*, 46 Wash. 511, 90 Pac. 656.

It is next contended that the proposed railroad must cross the Willapa river, a navigable stream, and that the consent of the secretary of war to the bridging of the stream has not been obtained. This fact does not defeat the right of condemnation. *State ex rel. Hulme v. Grays Harbor and Puget Sound R. Co.*, 54 Wash. 530, 103 Pac. 809.

It is further contended that the company has only built six and one-half miles of road since 1906, and has been guilty of laches. This defense we apprehend is not open to the relator. If the company is about to construct its road and utilize the property at the present time or in the near future the proceedings are fully authorized by law. Under this heading it is also claimed that a road for so short a distance is not a common carrier. The character of the use and not its extent or the length of the road determines the question of public use and public necessity. *State ex rel. Ami. Co. v. Superior Court*, 42 Wash. 675, 85 Pac. 669; *State ex rel. Milwaukee Terminal R. Co. v. Superior Court*, 54 Wash. 365, 103 Pac. 469, 104 Pac. 175.

Again, it is contended that a part of the capital stock of the petitioning company was subscribed by trustees, without disclosing their principals. Such a subscription was held valid by this court in *State ex rel. Biddle v. Superior Court*, 44 Wash. 108, 87 Pac. 40; and *State ex rel. Columbia Valley R. Co. v. Superior Court*, 45 Wash. 316, 88 Pac. 332. This must be true where the capital stock has been fully paid in, as in this case.

It is lastly contended that W. S. Cram, the president of the

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railroad company and one of its trustees, is also a trustee and secretary of the Silver Mill Company, a corporation, authorized to manufacture and sell lumber, and that said mill company has its plant and place of business at Raymond on the line of the proposed road; that the Silver Mill Company, the Willapa Lumber Company, and the Columbia Box & Lumber Company, are all stockholders in the railroad company, engaged in the manufacture and sale of lumber, and that the act of February 23, 1905, Laws of 1905, p. 51, authorizing corporations to own and hold stock in other corporations is unconstitutional, against public policy, and void. The fact that private individuals or private corporations having a special interest in the construction of a railroad subscribe to its capital stock does not deprive the road of its public character. The road when constructed will be a public service corporation and must serve the public, regardless of the individuality of its stockholders or the business in which they may be engaged. *State ex rel. Wilson v. Superior Court*, 47 Wash. 397, 92 Pac. 269; *Ulmer v. Lime Rock R. Co.*, 98 Me. 579, 57 Atl. 1001; *Madera R. Co. v. Raymond Granite Co.*, 3 Cal. App. 668, 87 Pac. 27; *Kansas & T. Coal R. v. Northwestern Coal & Min. Co.*, 161 Mo. 288, 61 S. W. 684; *Postal Tel. Cable Co. v. Oregon S. L. R. Co.*, 23 Utah 474, 65 Pac. 735; *Hairston v. Danville & W. R. Co.*, 208 U. S. 598, 28 Sup. Ct. 331, 52 L. Ed. 634.

We fail to see wherein the act of 1905 is unconstitutional, and the only objection urged by counsel is the opportunity the act affords to stifle competition. This alone would not warrant us in declaring the act unconstitutional. If the opportunity offered is abused the remedy is with the legislature, or perhaps the courts will find a remedy should such cases arise.

We find no error in the record, and the judgment is therefore affirmed.

MOUNT, PARKER, CROW, and DUNBAR, JJ., concur.

[No. 8084. Department Two. December 9, 1909.]

E. M. BROWN, *Appellant*, v. WILLIAM HALEY, *Respondent*.¹

EJECTMENT—DEFENSES—NECESSITY OF PLEADING—ISSUES AND PROOF—GENERAL DENIAL. Although the plaintiff in ejectment fails to deraign his title, the defendant cannot, under a general denial, introduce affirmative evidence to show title in himself by adverse possession, under Bal. Code, § 5509, providing that the defendant shall not be allowed to give in evidence an estate in himself or right to the possession unless the same is pleaded in his answer.

APPEAL—REVIEW—AMENDMENTS TO CONFORM TO PROOF. Where testimony outside the issues is admitted against objection, in an action at law tried by the court, the supreme court will not consider amendments made to conform to the proof.

Appeal from a judgment of the superior court for Jefferson county, Still, J., entered October 26, 1908, upon findings in favor of the defendant, in an action of ejectment tried before the court without a jury. Reversed.

A. R. Coleman, for appellant.

A. W. Buddress, for respondent.

CROW, J.—This action was commenced by E. M. Brown against William Haley, to recover possession of land, with damages for its detention. The plaintiff alleged:

“(1) That plaintiff is the owner in fee simple and is entitled to the possession of the following described lands and premises in Jefferson county, Washington, to wit: (description). ”

“(2) That defendant is wrongfully in possession of said land and withholds the same, and the possession thereof, from plaintiff, to the damage of plaintiff in the sum of one hundred dollars.”

The defendant denied each and every allegation of the complaint. On trial, the plaintiff produced deeds and other written evidence sufficient to show the fee simple title in him-

¹Reported in 105 Pac. 478.

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self, deraigned from the United States government. Without disputing the execution or validity of any of these written instruments, the defendant by cross-examination of plaintiff's witnesses and by affirmative evidence introduced in his own behalf, was permitted to show facts tending to establish title by adverse possession in himself. To this evidence the plaintiff objected and saved exceptions. The trial court found for the defendant, and dismissed the action. The plaintiff has appealed.

Section 5508, Bal. Code, provides, that the plaintiff shall set forth in his complaint the nature of his estate, claim, or title to the property, that the defendant may set up a legal or equitable defense to plaintiff's claims, and that the superior title whether legal or equitable shall prevail. Section 5509, Bal. Code, provides that "The defendant shall not be allowed to give in evidence any estate in himself or another in the property, or any license or right to the possession thereof, unless the same be pleaded in his answer." Although the appellant in his complaint pleaded the nature of his title by alleging it to be in fee simple with right of possession, he failed to plead the various instruments by which he deraigned it from the United States government. The respondent failed to plead any title in himself, his answer being a general denial only. The appellant contends that the trial court erred, (1) in admitting respondent's evidence of adverse possession for the purpose of proving title in him, and (2) in its findings of fact, conclusions of law, and decree.

The controlling question before us is whether respondent should have been permitted to introduce affirmative evidence to show title in himself by adverse possession. He has presented a voluminous and well prepared brief in support of his position that under the issues the evidence was properly admitted. It is not necessary that we should enter upon a discussion of each and every point he has discussed. They all involve the single contention that, by reason of appellant's failure to allege the various deeds and instruments through

which he deraigned his title, respondent was entitled under his general denial to show any facts sufficient to establish adverse title in himself. In other words, he contends that the defendant in an action to recover possession of real property may, under a general denial, introduce any affirmative evidence showing or tending to show title in himself, should the plaintiff in the first instance fail to deraign his title by the allegations of his complaint. In support of this contention he cites *Parker v. Dacres*, 1 Wash. 190, 24 Pac. 192; *Carkeek v. Boston Nat. Bank*, 16 Wash. 399, 47 Pac. 881; *Chrast v. O'Connor*, 41 Wash. 360, 83 Pac. 238.

None of these cases sustain respondent's present contention. They in effect hold that, when the plaintiff does not deraign his title by the allegations of his complaint, the defendant, under a general issue, may attack and dispute with affirmative evidence such evidence of title as the plaintiff offers. In *Parker v. Dacres*, the defendant not only answered by a general denial, but also pleaded title in himself under a mortgage foreclosure and sale. So far as the defendant's right to prove, under the general issue, an adverse or outstanding title in himself, was concerned, no such question arose; but under the denial he was permitted to prove facts which in equity were sufficient to estop the plaintiff's grantor, one Steil, from asserting title adverse to the foreclosure sale pleaded by the defendant and under which he held the property.

In *Carkeek v. Boston Nat. Bank*, an equitable action to enjoin an execution sale of lands in King county, it was held that where the reply for the first time alleged a certain title to other lands in Mason county, without deraigning the same, the defendant would be permitted to introduce evidence of fraud, for the purpose of defeating such alleged title in Mason county which was only incidental to the main issue in the case. In *Chrast v. O'Connor*, it was held that where the defendant alleged title generally, without deraigning it, the plaintiff under the general denial of his reply might intro-

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duce evidence to show that a deed offered by the defendant, as a part of his chain of title, was a forgery. In all of the above cases the affirmative evidence offered and admitted under the general denials tended directly to negative the evidence or claim of the adverse party. Here the respondent failed to introduce any evidence whatever to destroy the probative force or verity of the appellant's evidence. He made no attack on the execution, validity, sufficiency, or form of the deeds and other instruments, which indisputably and conclusively supported appellant's claim to the fee simple record title. Respondent's only evidence was in the nature of an avoidance of appellant's title, not to disprove the same, but to affirmatively show an independent title in himself by adverse possession. This evidence was, under the issues, admitted in direct violation of the positive prohibition of Bal. Code, § 5509, for instead of disproving appellant's title, respondent thereby sought to affirm his own without pleading the same. *Allen v. Higgins*, 9 Wash. 446, 37 Pac. 671, 43 Am. St. 847; *Garvey v. Garvey*, 52 Wash. 516, 101 Pac. 45.

Respondent now contends that his answer should be amended to comply with the proofs made; and that this court should consider all amendments that could have been made in the trial court. Had the evidence been admitted without objection, there might be some merit in this contention. The evidence was not only inadmissible under the pleadings and statute, but it was at all times vigorously assailed by appellant, who now, with much force, contends that no amendment can be ordered by this court to comply with evidence admitted over his objection, and that an amendment can only be allowed after trial when evidence sufficient to warrant it has been admitted, without objection. This is consistent with the rule announced in *Ness v. Bothell*, 53 Wash. 27, 101 Pac. 702, cited by the respondent, where this court, quoting from *Davis v. Hinchcliffe*, 7 Wash. 199, 34 Pac. 915, said:

"The court did not err in permitting the filing of the

amended answer. It has been the uniform ruling of this court that, in an equity case which is tried *de novo* here, the case will be tried upon the testimony, and the pleadings will be considered amended to meet the requirements of the testimony. 'In equity cases, if evidence is introduced without objection which would entitle a party to relief, the decision will be based upon it, without regard to the pleadings, which are treated as amended.' "

This is not an equity case, nor was the evidence introduced without objection. The respondent did not ask permission to amend during the trial. Had he done so, the appellant, on claiming surprise or showing his lack of preparation to meet the new issue, would have been entitled to a continuance. It would be an injustice to now allow an amendment to comply with proofs made under such circumstances. On the entire record, we conclude that the judgment should be reversed and a new trial granted, with permission to either party to amend his pleadings upon proper application. It is so ordered.

RUDKIN, C. J., MOUNT, PARKER, and DUNBAR, JJ., concur.

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Opinion Per CHADWICK, J.

[No. 8308. Department One. December 9, 1909.]

LILLY CALDWELL, *Respondent*, v. NORTHERN PACIFIC
RAILWAY COMPANY, *Appellant*.¹

CARRIERS—DUTY TO PASSENGERS—INSULTS—QUESTION FOR JURY. Whether the use of the words “such as you” by a railroad conductor was intended to be insulting or disparaging to a passenger who was afflicted with a bodily infirmity is a question for the jury.

SAME—INSTRUCTIONS AS TO DUTY. It is not prejudicial error to instruct that a carrier owes a special duty to a female passenger to protect her from insults, as it owes that duty to all passengers.

DAMAGES—MENTAL SUFFERING—EVIDENCE TO SUSTAIN—INSULTS—WANTONNESS. A passenger cannot recover compensatory damages for mental suffering from an insult on the mere declaration that she has suffered in feelings; but to sustain a recovery for more than nominal damages it must appear from attending circumstances that there was warrant for the mental attitude and wilful or wanton disregard of her rights.

DAMAGES—PERSONAL INDIGNITIES—EXCESSIVE VERDICT—NEW TRIAL. A verdict for one thousand dollars in favor of a crippled passenger, for insults by the conductor, is so excessive as to show passion or prejudice requiring a new trial, where it merely appears that the conductor provided a place for plaintiff and her wheel chair in the express car and required her to ride there when there were seats in the passenger coach in which she was entitled to ride, and that he did not act in a wanton manner or with any wilful intent to heap indignity upon her, and there was no greater degree of wrong or humiliation than embarrassment.

Appeal from a judgment of the superior court for Clarke county, McCredie, J., entered October 26, 1908, upon the verdict of a jury rendered in favor of a passenger for damages by reason of insults by the conductor. Reversed.

A. L. Miller and Geo. T. Reid, for appellant.

Frank E. Vaughan, for respondent.

CHADWICK, J.—Plaintiff is an invalid, being so crippled in her lower limbs that she is unable to walk in an erect posi-

¹Reported in 105 Pac. 625.

tion. Usually she propels herself in a wheeled carriage, but when necessary can hitch herself along, while sitting down, by pulling her feet forward with her hands. On the 12th day of July, in company with others, she went on a picnic excursion to Knapp's Station, about eight or ten miles west of Vancouver, Washington. In the morning of that day she had endeavored to get on the cars on the opposite side from the platform. A friend was present but was rendering her no actual assistance. Being observed by the conductor, he remonstrated, saying in effect that if she had friends they should assist her, and that she should have gone to the other side of the car where men were employed to assist passengers when entering the car. Plaintiff says the conductor used these words, "to assist such as you." However, the conductor did unlock the car door opening onto the platform, and allowed her to enter, she refusing his assistance. When the train arrived at Knapp's, the conductor took her in his arms and, possibly with the assistance of another, put her in her carriage on the platform. Plaintiff attaches no great importance to the manner in which she was treated in the morning, admitting that the conductor was polite and kind, but she says she thinks his manner was rather gruff when he first found her on the car steps, and that his remark "such as you" was uncalled for.

In the evening, before the train arrived at Knapp's, the conductor prepared a room at the end of the combination mail and express car, which was not then in use excepting only as the conductor used it as an office and as the brakemen used it as a place to keep some of their clothing. A door opened from this room, facing the platform and the door of the first-class passenger coach. There were doors also opening on each side, twelve or fourteen feet from the end of the car. When the train stopped at Knapp's, plaintiff was about to climb up the steps, when she was hailed by the conductor, who ordered her into the room he had prepared for her. She and her carriage were then lifted to-

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gether into the express car by two of her friends and a brakeman. She protested vigorously when told that she must ride in the express car, and it is again asserted by her and some of her friends that the conductor again said, this time in the presence of many other people, "This is the place for such as you," and words to that effect. Some of her friends came into the express car and rode with her. After a short time she got out of her carriage and rode on the floor, there being no chairs in the car. The reason she gives for this is that she was afraid her carriage might roll out of the car, although there is no evidence that it was at all likely. It is further asserted that, although the day was very warm, a fire had been built in the stove. This latter fact is denied by the conductor and others. But whether it be so or not, we are not disposed to attach any importance to it as a circumstance showing malice, which was the evident purpose of the testimony. There is nothing to show that the fire was put there by the conductor or any servant of the company. If there was a fire, with three doors open and the train moving, it is not likely that plaintiff suffered any injury therefrom. From a judgment in the sum of \$1,000 in favor of plaintiff, defendant has appealed.

A number of errors are assigned, all but one going to the instructions of the court. It is urged, that the court should not have submitted the question of insult to the jury; that the testimony does not warrant the inference that the conductor intended any insult whatever. While it seems improbable that the conductor, by the use of the words "such as you," etc., meant any insult, or intended to refer in any intemperate way to respondent's infirmity, the effect of his language would depend upon his manner and the manner of his speech. It was clearly a question for the jury. It is to be regretted that a conversation or words from which a jury is called upon to draw a legal conclusion must be repeated by those whose interest may unconsciously drive them to give a tone or color never intended by the first speaker,

and which may result even in injustice to him. But there is no better way, nor is it likely that one will ever be devised. Consequently, when dealing with this class of testimony, courts must take the verdict for the fact.

It is also complained that the court told the jury that a carrier owed an especial duty to a female passenger to protect her from insult. Without committing ourselves to the doctrine that a carrier owes a higher duty to a female passenger than to a male passenger in this respect, we think that the instruction was not prejudicial, for it cannot be denied that a carrier owes such a duty to every passenger.

The final assignment is that the verdict is so excessive as to show prejudice or passion on the part of the jury. A party is entitled to recover for the actual, measurable wrongs sustained, and in addition thereto such damages as result from injury to the feelings; or, as it has been put, compensation for mental suffering. But there must be some ground upon which to base this element. Damages do not flow from the mere declaration of the party that he has suffered in feeling. There must be facts or circumstances showing some warrant for the mental attitude of the one who alleges the wrong, so that in order to warrant a recovery on this account for more than nominal damages the wrong must be attended by circumstances showing a wanton or wilful disregard of the rights of the passenger. In other words, in an action against a company for the wrong of its servant, the conduct of the servant as well as the humiliation suffered by the passenger are facts to be considered in the light of all attending facts and circumstances, as matter in aggravation rather than the basis of the right itself.

“The motive of the wrongdoer is a material consideration, though affecting the question of compensatory damages simply. The reason for this is that if the wrong is committed wilfully, wantonly, or maliciously, it is likely to be more trying or aggravating in its mental effects than if such elements are lacking.” 8 Am. & Eng. Ency. Law (2d ed.), p. 661.

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On the other hand, the act of the servant may be shown in mitigation of the alleged wrong, whether the resultant damages be allowed as compensation or by way of punishment and example. Hence, where exemplary damages are allowed, the rule is stated thus:

“If the servant, in performing the act in question, was but in good faith attempting to do what he believed to be his duty, though mistakenly, exemplary damages cannot be allowed, though full compensation will be given.” 3 Hutchinson, Carriers (3d ed.), § 1443.

If this is the rule where exemplary damages are allowed, it must apply with added force where, as in this state, exemplary damages are not allowed in any case unless under some statute. It does not follow from the duty to award compensation that a jury can assess damages which upon the face of the verdict, considering the whole record, show an evident purpose to punish. There is absolutely nothing in the record to warrant the assumption that the conductor acted in a wanton manner, or with wilful intent to heap any indignity upon respondent. Indeed, in the cold light of the record, stripped of the drama of the trial, the wonder is that the jury returned a verdict for more than nominal damages. One of respondent's own witnesses, a lady who was with her in the car, could extract no greater degree of wrong or humiliation out of the case than embarrassment, an opinion in all probability emphasized by respondent's affliction. A fair reading of the record indicates no more than an honest attempt, possibly clumsily executed, to minister to the comfort of an afflicted person, and this met by a protest gendered of a supersensitive nature. But respondent was received as a passenger. The jury found that there were vacant seats in the passenger coach in which she was entitled to ride. She is therefore entitled to compensation for her actual injuries. We confess our inability to fix this amount on any rational basis, and the verdict being unaccountable on any other theory than that the jury was influenced by passion and

prejudice, or a spirit of vindictiveness aggravated by the helpless condition of the respondent, we have decided to follow the practice adopted in the case of *Olson v. Northern Pac. R. Co.*, 49 Wash. 626, 96 Pac. 150, and remand the case for a new trial, without foreclosing the right of appellant to assert all defenses heretofore urged by it.

RUDKIN, C. J., FULLERTON, MORRIS, and GOSE, JJ., concur.

[No. 8137. Department One. December 9, 1909.]

GEORGE HILZINGER, *Appellant*, v. C. C. GILLMAN, *as City Comptroller, et al., Respondents*.¹

MUNICIPAL CORPORATIONS—OFFICERS—ACTIONS—PARTIES—INTERVENTION—TAXPAYERS. In an action by a councilman to enjoin the city clerk from certifying to an elector's petition for his recall, a taxpayer has no interest entitling him to intervene under Bal. Code, § 4846, it not being alleged that the clerk would not defend the action.

MUNICIPAL CORPORATIONS—CHARTER—CONSTRUCTION—RECALL AND LEGISLATION. There is no conflict between a provision of a city charter contemplating a recall of a councilman, when his action is not responsive to the will of the majority, and another section providing for his removal by the city council for specified causes.

SAME—RECALL PROVISION—AUTHORITY FOR. A provision in a city charter adopted by a city of the first class under Const., art. 11, § 10, for the recall of a city councilman, is authorized by Bal. Code, § 740, providing that the city council shall have the powers, and shall be elected at the times, in the manner, and for the terms prescribed in the charter.

SAME—COUNCILMAN—TERM OF OFFICE—RECALL. A councilman elected for a definite term fixed by the city charter, which also contains a provision for his recall by a vote of the electors of his ward, is elected for a fixed term, subject to a condition subsequent.

SAME—TERM OF OFFICE—RECALL—IMPEACHMENT. Const., art. 5, § 3, providing that all officers shall be subject to removal for misconduct in office, has no application to a removal by the recall provided for in the city charter, and the advisability of such recall is a political and not a legal question.

¹Reported in 105 Pac. 471.

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Appeal from a judgment of the superior court for Snohomish county, Black, J., entered February 11, 1909, dismissing an action to enjoin the city clerk from certifying to an elector's petition for a recall, after sustaining demurrers to the complaint, and overruling a demurrer to a petition in intervention. Affirmed as to the demurrers to the complaint and reversed as to the demurrer to the complaint in intervention.

Coleman & Fogarty, for appellant.

W. G. McLaren, for respondents.

GOSE, J.—This action was instituted by the appellant to enjoin the city comptroller, who is *ex officio* city clerk of the city of Everett, a city of the first class, from certifying to the city council that a certain electors' petition was sufficient and in conformity with the provisions of the city charter. The complaint avers that the appellant has been duly elected as a councilman to represent the sixth ward in the city, for the term ending the first Tuesday after the first Monday in January, 1910; that he qualified and is acting as such; that the respondent Gillman is the comptroller and *ex officio* city clerk; that certain electors, in accordance with section 281 of the city charter, presented to and filed with the comptroller a petition, asking for the recall of the appellant as councilman, for the alleged reason that he is using the influence of his position to revive a certain franchise to the prejudice of the city; that the respondent comptroller will certify to the city council that the petition is sufficient, unless restrained by an order of the court, and that, if a certificate is filed, the council will immediately order an election for the purpose of choosing a successor to the appellant. The charter of the city is attached to, and made a part of, the complaint.

The respondent Hulbert was permitted to intervene as an elector and a taxpayer in the city. The appellant demurred to the petition in intervention, and the intervener and the respondent comptroller severally demurred to the complaint

on the ground that it does not state facts sufficient to constitute a cause of action. The appellant's demurrer was overruled, and the demurrers of the respondents were sustained. Whereupon, the appellant having elected to stand upon his complaint, the action was dismissed, and the appeal was taken from such judgment.

The appellant first contends that the intervener has no such "interest in the matter in litigation" as to entitle him to intervene under the provisions of Ballinger's Code, § 4846. We think he is right in this contention. Without undertaking to define in what cases a party may intervene, we are satisfied that an elector and taxpayer has no such interest in the matter in litigation in this case as to warrant an intervention. There is no allegation in his petition that the comptroller will not appear and defend the action. In *Westland Publishing Co. v. Royal*, 36 Wash. 399, 78 Pac. 1096, a suit against a school district upon an alleged contract, it was held that a resident and a taxpayer in the school district could not intervene. See, also, Pomeroy, Remedies & Remedial Rights (2d ed.), § 424; 17 Am. & Eng. Ency. Law (2d ed.), pp. 180-183; 11 Ency. Plead. & Prac., 446, 447. The demurrer to the complaint in intervention should have been sustained.

In accordance with the power contained in § 10, art. 11, of the constitution and the legislation enacted thereunder (Laws 1890, p. 215 *et seq*; Bal. Code, § 735), the city of Everett, having a population in excess of twenty thousand, adopted a charter for its own government. Under the provisions of § 281 of the charter, certain electors of the sixth ward of the city, the ward represented by the appellant, filed with the comptroller a petition for the recall of the appellant and the election of his successor. This section, so far as is necessary to a correct understanding of the case, provides:

"Sec. 281. The holder of any elective office may be removed at any time during his term by the electors qualified to vote for a successor of such incumbent. The procedure to

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effect the removal of an incumbent of an elective office shall be as follows: A petition, signed by voters entitled to vote for a successor to the incumbent equal in number to at least twenty-five per centum of the entire vote for all candidates for the office, the incumbent of which is sought to be removed, cast at the last preceding general municipal election, demanding an election of a successor of the person to be removed, shall be filed with the city clerk; provided, that the petition sent to the council shall contain a general statement of the grounds for which the removal is sought. . . . If the petition shall be found to be sufficient, the clerk shall submit the same to the council without delay; and thereupon the city council shall order, and fix a date for the holding of such election, . . . Any person sought to be removed may be a candidate to succeed himself, . . . At such election if some other person than the incumbent receives the highest number of votes, the incumbent shall thereupon be deemed removed from the office upon the qualification of his successor."

Section 31 provides that, "All officers elected at said first election as herein provided shall hold office until the first Tuesday after the first Monday in January, 1910, unless removed as in this charter provided." Section 32 provides that, in all subsequent elections, "the term of office of every elective officer then elected shall then and thereafter be two years, unless removed as in this charter provided." Section 25 provides that, "Any elective officer other than a member of the city council may be suspended by the mayor and removed for cause by the city council." It then provides that inability or wilful failure properly to perform his duties, or the commission of a crime or misdemeanor involving moral turpitude, absence from the city for twenty days without consent, open failure or refusal to discharge his duties, the habitual use of intoxicating liquors to excess, or any permanent disability preventing the proper discharge of his duties, shall constitute cause for the removal of any elective officer; but that "the city council only shall have power to suspend or remove a member of that body," which may be done for

any of the enumerated causes. Ample provision is made in the charter for direct control over the city council and its legislation by the initiative and referendum.

Appellant's first contention is that there is a conflict between the provisions of §§ 25 and 281 of the charter, in relation to the removal of a member of the city council, and that the former, being specific in its nature and relating to a particular subject, must control. A reading of the two sections in the light of the charter as an entirety discloses a clear purpose upon the part of the electors of the city to reserve to themselves the power to control the entire legislative and executive policy of the city. Section 282 provides that twenty per centum of the electors may propose and submit an ordinance to the council, and that it shall either pass the ordinance without alteration within a fixed time or submit it to a vote of the people. Section 283 provides that no ordinance passed by the council, except when otherwise required by the general laws of the state or by the provisions of the charter, except an ordinance for the immediate preservation of the public peace, health, or safety, which contains a statement of its urgency and is passed by a two-thirds vote of the council, shall go into effect before ten days from its final passage; and if during the ten days a petition, signed by ten per cent of the electors, be presented to the council, the ordinance shall be suspended and the council shall reconsider it, and if it is not entirely repealed it shall be submitted by the council to the vote of the electors and shall only become effective upon receiving the sanction of a majority vote. It is apparent that there is no real conflict between the two sections. Section 25 provides for a summary removal of an elective officer for certain specific causes, whereas § 281 contemplates a recall of the officer at any time that his official conduct is not responsive to the wish or will of a majority of the electors in his precinct or ward. Whilst this section provides that the reason for the recall shall be stated in the petition, the charter does not provide that any specific reason shall be necessary

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or controlling. The whole scheme or system of the charter makes it apparent that the right of recall of elective officers was reserved to the people, to be exercised at any time the public interest was thought to require it. We have adverted to the fact that provision is made whereby the incumbent may submit his official conduct to a vote of the people, and that if he receives a vote of confidence he continues in office. His successor is elected and inducted into office under the recall provision only upon the failure of the incumbent to secure an indorsement of his stewardship by a majority of the electorate. Like the British ministry, an elective officer under the charter is at all times answerable to the people for a failure to meet their approval on measures of public policy.

It is next urged that there is neither constitutional nor legislative authority for the recall provision. Section 10, art. 11, of the constitution provides that, "Any city containing a population of twenty thousand inhabitants or more shall be permitted to frame a charter for its own government consistent with and subject to the constitution and laws of this state." We need not inquire whether this provision is self-acting, as the legislature has made ample provision for giving it effect. Laws 1890, p. 215 *et seq.* Our code (Bal. Code, § 740) which is § 6 of the Laws of 1890, provides that, in cities of the first class the mayor and members of the city council shall have the powers, shall be elected at the times, in the manner, and for the *terms* prescribed in the charter. As was said in *Good v. Common Council of San Diego*, 5 Cal. App. 265, 90 Pac. 44:

"The fixing of the tenure of office of the officers of a municipality subject to removal by the body that elected them is comparatively new in our system of government, and the interpretive branch of the law is in rather an undeveloped state on the subject."

In discussing this question, it is pertinent to inquire for what term was the appellant elected. This inquiry is answered by the charter, and the answer is that he was elected

to hold office until the first Tuesday after the first Monday in January, 1910, unless removed for cause or recalled in the manner provided therein. His term, while in a measure fixed, was subject to the condition subsequent that twenty-five per cent of the electorate of the ward from which he was elected could by petition express their disapproval of his official action upon one or more measures of local policy, and demand that he be sustained by a vote of confidence or retire. Our code (Bal. Code, § 742) provides that the act empowering cities of the first class to adopt a governing charter shall be liberally construed for the purpose of carrying out the objects for which the law was intended. Both the constitution and the general law recognize that large, growing cities should be empowered to determine for themselves, and in their own way, the many important and complex questions of local policy which arise, and it is only when some act in the execution of that policy conflicts with the general law or contravenes the constitution, that the act can be questioned. We do not think that the official act sought to be restrained exceeds the power conferred upon the city by the general law or conflicts with it. The following cases are in harmony with this view: *Good v. Common Council, supra*; *In re Pfahler*, 150 Cal. 71, 88 Pac. 270, 11 L. R. A. (N. S.) 1092; *Ewing v. Seattle*, 55 Wash. 229, 104 Pac. 259; *Hindman v. Boyd*, 42 Wash. 17, 84 Pac. 609; *St. Louis v. Western Union Tel. Co.*, 149 U. S. 465, 13 Sup. Ct. 990, 37 L. Ed. 810; *Matter of Carter*, 141 Cal. 316, 74 Pac. 997; *Attorney General v. Jochim*, 99 Mich. 358, 58 N. W. 611, 41 Am. St. 606. Whether we treat the power sought to be exercised as being derived from the constitution subject to the control of the general law, or as derived from the latter, the result will be the same. If derived from the constitution, it does not conflict with the general law, and if derived from the latter it is within its spirit and purpose.

It is finally urged that the recall provision in the charter is violative of § 3, art. 5, of the constitution, which provides

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that, "All officers not liable to impeachment shall be subject to removal for misconduct or malfeasance in office, in such manner as may be provided by law." This contention has been disposed of by what we have said concerning the several sections of the charter. The people of the city of Everett in framing the charter intended that their representatives should be held strictly amenable to both the existing and changing public sentiment on all local measures, and that if the official conduct of any elective officer failed at any time to so respond, he was subject to recall if the majority of the electorate in his district so determined. The appellant accepted the trust subject to this power in his constituency, and the duration of his term of office is dependent upon the wish of the majority as expressed at the polls. The removal sought is not of the character provided for in the constitution. Whether the interests of the city will be better subserved by a ready obedience to public sentiment than by a courageous adherence to the views of the individual officer on questions of public concern, is a political and not a legal question.

The judgment will be affirmed as to the comptroller, and reversed as to the intervener, with directions to sustain the demurrer to his petition.

RUDKIN, C. J., FULLERTON, CHADWICK, and MORRIS, JJ., concur.

[No. 8162. Department One. December 9, 1909.]

DANIEL HALE, *by His Guardian Ad Litem, F. P. Wagner,*
Respondent, v. CROWN COLUMBIA PULP AND PAPER
COMPANY, *Appellant.*¹

EVIDENCE—JUDICIAL NOTICE—ORDER APPOINTING GUARDIAN AD LITEM. In an action by a minor, by his guardian *ad litem*, the court will take judicial notice of its order appointing the guardian *ad litem*, for the purpose of the action, entered upon a petition referring to the complaint on the same day the complaint was filed.

PARTIES—INFANTS—CAPACITY TO SUE—WAIVER OF OBJECTION. Objection to the capacity of a minor to sue, appearing on the face of the complaint, is waived by failing to demur on that ground.

CORPORATIONS—EVIDENCE OF INCORPORATION—WAIVER BY PLEADING. A defendant corporation waives proof of its corporate existence by appearing generally and going to trial on the merits.

MASTER AND SERVANT—NEGLIGENCE—CONTRIBUTORY NEGLIGENCE—QUESTION FOR JURY. The question of the master's negligence and of the servant's contributory negligence is for the jury, where the accident was due to a defective brake, and he was struck by a wire cable while working at the place and in the manner directed, without warning of the danger.

SAME—CONTRIBUTORY NEGLIGENCE—METHODS OF WORK—TWO WAYS—INSTRUCTIONS. It is not error to refuse to give an instruction upon the subject of contributory negligence in adopting an unsafe method of doing the work, where there was no evidence that there was a choice of ways.

SAME—DETAILS OF WORK. It is not error to refuse an instruction that the master was not liable for the details of the work where there was no basis for it in the evidence.

NEGLIGENCE—INSTRUCTIONS—BURDEN OF PROOF. The burden of proof is sufficiently defined by an instruction that the happening of an accident did not show negligence, but the burden was upon the plaintiff to show it by a preponderance of the evidence, and he could not recover if the evidence was evenly balanced.

MASTER AND SERVANT—FELLOW SERVANTS—DEPARTMENTS. A brakeman on a tram car is not in the same department with, and is not a fellow servant of, a trackman engaged in putting plates on the steel of the tram rails.

¹Reported in 105 Pac. 480.

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SAME. Persons engaged in a common employment and so situated as to have opportunities to use precautions against each other's negligence are fellow servants.

MASTER AND SERVANT—APPLIANCES—INSTRUCTIONS. An instruction that the master is bound to keep the machinery in good or "sound" repair is not erroneous.

Appeal from a judgment of the superior court for Clarke county, McCredie, J., entered October 23, 1908, upon the verdict of a jury rendered in favor of the plaintiff, for personal injuries sustained by an employee in a mill. Affirmed.

Wilbur & Spencer and *A. L. Miller*, for appellant.

E. M. Green and *R. C. Sugg*, for respondent.

Gose, J.—This action was instituted by the respondent, the plaintiff below, to recover compensation for personal injuries sustained on January 17, 1908. From a verdict and judgment in his favor this appeal is prosecuted.

The case is entitled, "Daniel Hale, by his guardian ad litem, F. P. Wagner." The complaint states that the plaintiff is a minor of the age of twenty years, but it does not allege the appointment of a guardian ad litem, and there was no evidence introduced on that subject. The evidence does show, however, that the respondent was a minor of the age of twenty years at the time of the trial. It is contended that the failure of the respondent to allege and prove the appointment of a guardian ad litem precludes a recovery. The record shows, that the complaint was filed on March 21, 1908; that on the same day and under the same title the respondent filed a petition, referring to his complaint, suggesting his infancy, and asking that a guardian ad litem be appointed for the purpose of this action, and that on the same day an order was entered of record appointing F. P. Wagner as his guardian ad litem for that purpose. If the action be treated as prosecuted by the guardian, the objection is not tenable. Courts will take judicial notice of their records with reference to the prior proceedings in the case

at bar. 17 Am. & Eng. Ency. Law (2d ed.), § 925. If it be treated as one prosecuted by the minor personally, the appellant waived the question of capacity by pleading to the merits. Want of capacity to sue, when it appears on the face of the complaint, must be taken by a demurrer. Bal. Code, §§ 4907, 4909, 4911; *Blumauer v. Clock*, 24 Wash. 596, 64 Pac. 844, 85 Am. St. 966; *Rothchild Bros. v. Mahoney*, 51 Wash. 633, 99 Pac. 1031.

The complaint also alleges that the appellant is a corporation, but no evidence was offered in support of the allegation. An objection was raised upon this ground after verdict, and is renewed here. The rule is settled in this state that a defendant corporation cannot appear generally in an action, plead to the merits, and afterwards complain that there was no affirmative proof of its corporate existence. *Garneau v. Port Blakely Mill Co.*, 8 Wash. 467, 36 Pac. 463; *Sengfelder v. Mutual Life Ins. Co.*, 5 Wash. 121, 31 Pac. 428; *Frost v. Ainslie Lumber Co.*, 3 Wash. 241, 28 Pac. 354, 915.

The negligence charged in the complaint is that the respondent's injury was caused by the appellant operating one of its cars with defective brakes. The answer contains a general denial of the allegations of the complaint, and pleads affirmatively, that the respondent was guilty of contributory negligence; that he assumed the risk incident to his employment, and that the injury was caused by the negligence of a fellow servant.

At the time of the happening of the accident, the respondent was working on an elevated tramway, putting fish plates on the steel rails over and upon which the appellant was operating cars in carrying its products from the finishing room in the mill to the dock. The tramway is several hundred feet in length, has a height of about twenty feet at the mill, from which point it descends toward the dock upon a grade of four or four and one-half per cent, for the first three hundred feet from the mill, at which point it curves to

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the left for a short distance, from whence it proceeds to the dock on a comparative level in a straight line. The cars were operated in this manner: In the finishing room, a few feet from the head of the tramway, there was a donkey engine which supplied the power to operate a revolving drum and wire cable. There was a ring in the cable which could be attached to a hook on the rear of the car. Whether the car was controlled on the grade in going to the dock with the engine and cable in connection with the brakes on the car, or by the latter only, was a disputed question at the trial. It is admitted, however, that the cable was attached to the car at the mill, and carried about three hundred feet, at which point the cable was slackened and detached and the car controlled from that point to the dock by means of brakes. The cable was left at the point of detachment and the returning car was carried from that point to the mill by the power supplied by the engine.

The evidence tends to show that, at the time of the accident and for two months preceding, the brakes were defective and the iron shoe badly worn; that the injury was caused by the defective brakes in this, that near the foot of the grade the cable was slackened, the brakes set, and a block of wood placed under the car wheels preparatory to detaching the cable; that the car suddenly started and, when it reached the curve, the cable tightened, describing a straight line and striking the respondent, who was working a few feet from the mill on the left rail looking from the mill, throwing him to the ground a distance of fifteen or twenty feet. He struck with such violence that he remained unconscious for about five hours, sustaining the injuries complained of. The evidence further shows that the respondent had been warned to "look out for the cars"; that the track was about eight feet in width, the cars about seven feet in width, leaving a space of about six inches on either side of the car, and that there were no guard rails. Whether there were projections from the tramway at intervals of a few feet where the respondent

could go to avoid the moving cars was a disputed question. The respondent asserted that there were such projections, and the appellant denied it. The respondent was working at the place where he was directed to work, and his only warning was to protect himself against danger from the moving cars, which the testimony tends to show he did by stepping aside when the car approached. Numerous errors are assigned, but as we view the case it falls within a reasonably narrow compass, and it will not be necessary to consider each assignment separately.

There was no error in denying the motion for a nonsuit and directed verdict, nor was there any merit in the motion for a judgment *non obstante*. As we have seen, the respondent was working at the place and in the manner he was directed to work. So far as the evidence discloses, the brakeman was the only witness who saw the respondent at the time he was struck, and he testified that he was struck by the wire cable.

The appellant requested the court to instruct that where there were two ways of doing the work, or two places to stand while working, the one safe and the other dangerous, and the servant voluntarily chose the latter, he was guilty of contributory negligence and could not recover. The refusal to give this instruction is assigned as error. The court did instruct, however, that if the respondent's negligence contributed to his injury, he could not recover, and that if the master had directed or warned him how to work and he had disobeyed the directions, there could be no recovery. In this case there was no choice of ways shown by the evidence. There was but one place to work and but one place to stand while working. Respondent stood and worked where the master directed.

Complaint is also made because the court refused to instruct that the master is not responsible for an injury resulting from the negligent execution of the details of the work. This instruction had no basis in the evidence. The respond-

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ent's witnesses testified that the accident happened because the brakes would not hold the car, and the appellant's witnesses did not see the accident.

It is contended that the court did not sufficiently define burden of proof. The court instructed that the happening of an accident did not show negligence, but that the burden was on the respondent to prove negligence by a preponderance of the evidence; that if he failed to do so or if the scale was evenly balanced, the verdict should be for the appellant. This sufficiently defines burden of proof.

Error is also assigned in the refusal to instruct, "that the men working on the car at the time of the accident were fellow servants of the plaintiff, and if the accident was caused by their negligence the plaintiff cannot recover." The respondent and the brakeman were working for a common master, but were not engaged in a common employment. The respondent was engaged in an independent employment, and the brakeman was not his fellow servant. *Mullin v. Northern Pac. R. Co.*, 38 Wash. 550, 80 Pac. 814; *Shannon v. Consolidated Tiger & Poorman Min. Co.*, 24 Wash. 119, 64 Pac. 169; *Hammarberg v. St. Paul & Tacoma Lumber Co.*, 19 Wash. 537, 53 Pac. 727. Moreover the court instructed that, if the respondent and the brakeman were engaged in a common employment and were so situated as to have opportunity to use precautions against each other's negligence, they were fellow servants, and if the accident happened through the negligence of a fellow servant, the verdict should be for the appellant. This stated the correct rule for determining who are fellow servants. *Berg v. Seattle, Renton & Southern R. Co.*, 44 Wash. 14, 87 Pac. 34, 120 Am. St. 968; *Shannon v. Consolidated Tiger & Poorman Min. Co.*, *supra*.

Error is assigned in the giving of the following instruction:

"It is the duty of the master to exercise ordinary care and prudence to keep the machinery and appliances in sound re-

pair so that harm does not result to the servant for injuries which may happen to them in the use of said machinery and appliances."

It is urged that the use of the word "sound" makes the instruction erroneous. The law imposes the positive duty of the master to use reasonable care and prudence to keep the machinery in good or sound repair. Qualified as the word is in the instruction, it correctly states the rule. *Gustafson v. Seattle Traction Co.*, 28 Wash. 227, 68 Pac. 721; *Ogle v. Jones*, 16 Wash. 319, 47 Pac. 747; *McDonough v. Great Northern R. Co.*, 15 Wash. 244, 46 Pac. 334. The court had theretofore instructed that the law imposes on the master only the duty to use reasonable and ordinary care in the matter of machinery and appliances, and that where he has done so he cannot be held liable for the consequences of a defect therein.

The question of the negligence of a fellow servant was not charged in the complaint, nor did the respondent seek to show any ground of liability except that of defective brakes on the car. The court, after instructing at length as we have indicated, said to the jury:

"There is only one point of negligence charged in the case; that is, improper brakes. The plaintiff cannot recover except by proving negligence on his charge. If you should decide that the brakes were in a reasonably good condition at the time of the injury, I instruct you that you must return a verdict for the defendant."

The issues as thus limited were, (1) were the brakes defective; (2) could the appellant in the exercise of reasonable care have ascertained the defect, and (3) were the defective brakes the proximate cause of the injury. Upon those questions the jury was correctly instructed.

The judgment will be affirmed.

RUDKIN, C. J., CHADWICK, FULLERTON, and MORRIS, JJ.,
concur.

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Statement of Case.

[No. 8255. Department One. December 10, 1909.]

J. A. HUDSON, Respondent, v. P. C. ELLSWORTH, Appellant.¹

EVIDENCE—PAROL EVIDENCE TO VARY WRITING. Where a mortgage provided that the mortgagor shall keep the buildings insured for the benefit of the mortgagee and deliver the policies of insurance to him, oral evidence that the mortgagee agreed to secure the insurance and that the mortgagor paid him \$30 and took a written receipt therefor at the time of the execution of the mortgage, is not inadmissible as varying the terms of the mortgage; and the mortgage and receipt should be construed as one instrument.

SAME—SECONDARY EVIDENCE—LOSS OF WRITING. In such a case, upon establishing the loss of the receipt, oral evidence is admissible to prove its contents.

PLEADINGS—AMENDMENT AT TRIAL. Error cannot be predicated on the allowance of a trial amendment to the complaint, when no continuance was asked and no abuse of discretion shown.

CONTRACTS — CONSIDERATION — GRATUITOUS SERVICE — MORTGAGE—AGREEMENT TO SECURE INSURANCE—LIABILITY FOR LOSS. A mortgagee who had required a stipulation in the mortgage for insurance of buildings on the premises is not liable for the loss of the property by reason of agreeing to secure the insurance, accepting the insurance premium, and giving a receipt therefor, where he had not entered upon performance of the service, unless the same was all one continuous transaction, so that the giving of the mortgage would constitute the consideration for the agreement to secure insurance; the mere payment and acceptance of the premium being *nudum pactum* and insufficient alone to support a subsequent promise.

FULLERTON, J., dissents.

Appeal from a judgment of the superior court for King county, Gilliam, J., entered May 3, 1909, upon the verdict of a jury rendered in favor of the plaintiff, in an action to recover for the loss of property agreed to be insured, after a trial on the merits. Reversed.

E. P. Dole and *J. E. McGrew*, for appellant.

Larrabee & Wright and *J. L. Corrigan*, for respondent.

¹Reported in 105 Pac. 463.

Gose, J.—The appellant, on September 18, 1906, loaned the respondent \$1,900, due in three years, for the purpose of building a dwelling house on certain town lots, taking as security a mortgage upon the property. The mortgage provided:

“The mortgagor hereby agrees (until full satisfaction of this mortgage)—to keep all buildings upon said premises insured against fire to the extent of twenty-five hundred dollars, in a company or companies acceptable to, and for the benefit of, the mortgagee, and to deliver the policies and renewals thereof to the mortgagee.”

The amended complaint states that the appellant demanded as further security for the loan, that the respondent should have the dwelling insured, and that after the mortgage had been delivered the appellant agreed, in consideration of the payment of the premium to him by the respondent, that he would have the dwelling insured as stipulated in the mortgage; that the respondent paid him the amount of the premium; that thereafter the respondent constructed the dwelling house, which was of the reasonable value of \$3,500, and which was totally destroyed by fire on the 6th day of December, 1908; that the appellant did not insure the property, and that the respondent, relying upon the promise of the appellant to procure the insurance and believing that he had done so until after the house was burned, did not insure the same. The appellant answered, denying that he agreed to procure the insurance, or that the respondent paid him the premium. Upon the issues stated, the case was tried to a jury, resulting in a verdict and judgment for the respondent in the sum of \$2,500. From this judgment the appeal was taken.

Over the objection of the appellant, the respondent was permitted to testify that, after the mortgage had been acknowledged, the appellant said to him, “Now, what about insurance”; that if respondent would pay him the premium, he would see that the dwelling was insured; that appellant stated that the premium on a \$2,500 policy for three years

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would be \$30, "and so then I told him that I would pay him the \$30 and he could get the policy, and he said that he would do it; that I then paid him the \$30 and the appellant gave me a receipt"; that the receipt stated: "Received of J. A. Hudson \$30 for insurance which was to be applied on the house. The sum of the insurance was to be \$2,500. (Signed) P. C. Ellsworth"; that he gave the receipt to his wife. Other evidence of the respondent shows that the house referred to in the receipt was the dwelling to be constructed upon the mortgaged premises. The respondent's wife testified that the respondent gave her the receipt, and corroborated him as to its contents. The house was destroyed by fire within three years from the date of the mortgage.

The appellant assigns error upon the admission of this testimony, and contends that it varies the terms of the written contract. We think not. A stipulation in the mortgage requiring the respondent to advance the premium and the appellant to procure the insurance, would have been valid and binding upon both the parties. The mortgage would have been a sufficient consideration to support such contract. This seems to us to be elementary. If the respondent during the negotiations, either before or after the execution and delivery of the mortgage, but as a part of the transaction, paid the premium to the appellant, and he agreed to procure the insurance and gave the receipt which we have set out, the two instruments would be construed together as one transaction, and the mortgage would be a sufficient consideration to support the promise of the appellant to procure the insurance. Suppose in lieu of the quoted clause in the mortgage, it had provided that the mortgagee, upon the payment to him of the sum of \$30 by the mortgagor, would take out insurance upon the dwelling house in the sum of \$2,500 for three years, loss, if any, payable to the mortgagee according to his interest, would its validity be debatable? It is fundamental that written instruments executed as one transaction will be construed together.

Nor is the appellant's contention tenable that the contents of the receipt cannot be proven by parol, after its loss has been established. To illustrate, let us suppose that the respondent had executed a warranty deed as security, and that the appellant had executed an instrument reciting that the deed was in fact given as a mortgage to secure the payment of the loan, that the latter instrument had been lost, and that the appellant was claiming title under the deed—could it be doubted that the contents of the defeasance would be provable by parol?

The respondent at the close of his testimony was permitted to amend his complaint by the substitution of certain words. This is assigned as error. The allowance of the amendment was in the sound discretion of the court, subject, of course, to the right of the appellant to a continuance upon a proper showing, which was not requested. There was no abuse of discretion in permitting the amendment.

The court instructed the jury, in substance, that evidence of prior or contemporaneous negotiations could be considered, but solely with respect to its bearing upon the probability or improbability of a subsequent agreement having been made respecting the insurance; that if they should find from a preponderance of the evidence that, after the execution and delivery of the mortgage, the appellant received the premium from the respondent and agreed to procure the policy, and failed to do so, and the dwelling was destroyed by fire within three years from the date of the alleged agreement, then they should return a verdict in favor of respondent for \$2,500, or the value of the building if less than that sum. The learned trial court was evidently of the opinion that the acceptance of the premium by the appellant, subsequent to the delivery of the mortgage, upon a parol agreement upon his part to procure the insurance, made him liable in damages for a failure to do so. In this we think he was in error.

The only ground upon which the appellant can be held responsible under the evidence is that the execution and delivery

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of the mortgage, the acceptance of the premium, the agreement of the appellant to procure the insurance, and the execution and delivery of the receipt, were one continuous transaction. In such case the mortgage would furnish a sufficient consideration for the promise, and the contemporaneous instruments would be construed together. Upon the statement of the court, the promise of the appellant would be gratuitous and not enforceable.

“When the agency is gratuitous and the agent has never entered upon the performance of the service, he cannot be held liable for damage resulting from his nonfeasance, there being no consideration to support the promise. The inception of the performance is essential to the agent’s liability.” 1 Am. & Eng. Ency. Law (2d ed.), p. 1060.

There is an exception to this rule where the party promising to perform is an insurance agent or a factor or a broker.

The respondent urges that the acceptance of the premium was a sufficient consideration to support the promise. But this of itself would only render him liable to an action for the return of the money. As we have seen, when the agency is gratuitous, there is no liability unless the agent has entered upon the performance of the service. In the instant case the service was to procure the insurance. This the appellant did not do, nor does the evidence tend to show that he took any step toward its accomplishment. The respondent cites *Criswell v. Riley*, 5 Ind. App. 496, 30 N. E. 1101, 32 N. E. 814; *Lindsay v. Pettigrew*, 5 S. D. 500, 59 N. W. 726; *Manny v. Dunlap*, Fed. Case No. 9,047; *Morris v. Summerl*, Fed. Case No. 9,837; *Walker v. Smith*, Fed. Case No. 17,086; *Samonset v. Mesnager*, 108 Cal. 359, 41 Pac. 337.

In the *Criswell* case an insurance agent, at the request of the owner, procured and delivered to her a fire insurance policy, issued by a company other than one he represented. She thereafter paid him the premium. The policy provided that the company should not be liable until the premium was actually paid to it. The agent retained the premium. The prop-

erty was destroyed by fire during the term covered by the policy. It was held that the agent was liable in damages for his failure to pay the premium to the company. In the *Lindsay* case an insurance agent loaned for his sister a sum of money, and took a real estate mortgage as security. As further security, he required the owner to deduct five dollars from the proceeds of the loan, as a payment for a policy on the house situate on the mortgaged premises, which he agreed to secure to continue for five years, loss payable to the mortgagee. He failed to effect the insurance, and the house was destroyed by fire during the period for which it was to have been insured. In holding the agent liable in damages, the court pointed out that his purpose in requiring the insurance was both to increase the security for the loan and to obtain the usual commission. In the *Manny* case the owner of farm machinery directed her general agent to procure a policy of insurance on the property, giving specific directions as to the amount and terms of the policy. The agent had money from his principal with which to pay the premium. Failing to procure the insurance and the property having been burned, he was held liable for the loss. In the *Walker* case a London merchant sent goods to the defendant in New York, requesting him to receive them, but not to deliver them to the purchaser without payment for the goods or satisfactory security being given. He received and delivered the goods without receiving payment or security. The purchaser failed, and the defendant received and remitted the amount paid him, retaining no commission. It was held that, although he was an unremunerated agent, having consented to render the service and having undertaken to perform, he was bound to act in conformity with the directions of his principal. In the *Samonset* case the court announced the same general principle.

There is a statement in the *Lindsay* case which supports respondent's contention, but, as we have seen, the party who was held liable was an insurance agent, and the court ad-

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verted to the fact that one object in demanding and receiving the premium was that he might obtain the usual commission for effecting the insurance. The cases all announce the same general principle, and we do not think the mere act of accepting the premium is equivalent to entering upon the performance of the duty, as the appellant did no act tending to effect the insurance.

The judgment will be reversed, with directions for a new trial in conformity with this opinion.

RUDKIN, C. J., and MORRIS, J., concur.

CHADWICK, J., concurs in the result.

FULLERTON, J., dissents.

[No. 8414. Department Two. December 10, 1909.]

THE STATE OF WASHINGTON, *on the Relation of L. L. True et al., Plaintiff*, v. THE SUPERIOR COURT FOR SPOKANE COUNTY, *Respondent*.¹

EMINENT DOMAIN—PUBLIC USE—EVIDENCE—SUFFICIENCY. The evidence of an engineer in charge of the surveys that a certain lot was necessary for the use of a railroad for a warehouse in which to handle its freight business is competent and sustains a finding that it was necessary for a public use.

Certiorari to review an order of the superior court for Spokane county, Hinkle, J., entered September 20, 1909, adjudging a public use in condemnation proceedings, after a hearing before the court. Affirmed.

H. M. Stephens (G. C. Israel, of counsel), for relators.

H. H. Field and *Cullen & Dudley*, for respondent.

PER CURIAM.—This proceeding is to review an order in condemnation, adjudging a certain lot in the city of Spokane necessary for a public use for the Chicago, Milwaukee &

¹Reported in 105 Pac. 639.

Puget Sound Railroad Company, a public service corporation. The petition in condemnation alleges that the lot is necessary

“for the purpose of construction, maintenance, and operation of said branch line of railroad, and for the necessary side tracks, depots, grounds, terminals, transfer and switching grounds, and warehouses required for receiving, delivering, storage and handling of freight with security and safety to the public, and the construction, maintenance, and operation of said proposed branch railroad, each and all of which uses are public uses.”

It is contended by the relators that there is no competent evidence that the property sought is necessary for the uses of the railroad company, and that the evidence shows that a part of the property is sought merely for the purpose of constructing warehouses thereon, to be leased to private persons for private purposes. After reading the evidence introduced, we are satisfied that there is no merit in these contentions. The engineer in charge of the surveys in the city of Spokane testified that the whole of the lot was necessary for the use of the railroad company for the purposes mentioned. He was clearly a competent witness to testify upon that subject. Counsel for the relators endeavored to have this witness say that the warehouses proposed to be constructed upon a portion of the property were to be leased to private persons for private business, but the witness refused to so testify, and insisted that the warehouses were necessary for the use of the company in order to handle its freight business, and that the whole of the lot was necessary, even insufficient, for the use of the railroad company. We find no justification for relators claiming otherwise upon this record.

Several collateral questions are presented in the brief, but all the pertinent questions in this case have been determined by this court in, *State ex rel. Harlan v. Centralia-Chehalis Elec. R. & P. Co.*, 42 Wash. 632, 85 Pac. 344, 7 L. R. A. (N. S.) 198; *State ex rel. Hulme v. Grays Harbor & Puget Sound R. Co.*, 54 Wash. 530, 103 Pac. 809; *State ex rel.*

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Merriam v. Superior Court, 55 Wash. 64, 104 Pac. 148; *State ex rel. Forney v. Superior Court*, 55 Wash. 215, 104 Pac. 200; *State ex rel. McIntosh v. Superior Court*, ante p. 214, 105 Pac. 637; and it is unnecessary to again enter into a discussion thereof. There is no error in the record, and the judgment is affirmed.

[No. 8282. Department Two. December 10, 1909.]

SAM OLSON, *Appellant*, v. SAMUEL J. GOODSSELL *et al.*,
Respondents.¹

EXEMPTIONS—HOMESTEAD—MECHANICS' LIENS—PRIORITY. A mechanics' lien, filed prior to the declaration of homestead, takes precedence over the homestead exemption.

Appeal from a judgment of the superior court for Spokane county, Huneke, J., entered January 28, 1909, upon an agreed statement of facts, dismissing an action to foreclose a mechanics' lien. Reversed.

Samuel Edelstein (*Post, Avery & Higgins*, of counsel), for appellant.

Gillespie & Ellis, for respondents Hall.

CROW, J.—This action was commenced on August 29, 1908, by Sam Olson against Samuel J. Goodsell, Mrs. Samuel J. Goodsell, his wife, Joseph Hall, and Mrs. Joseph Hall, his wife, to foreclose a lien upon real property in the city of Spokane. The cause was submitted upon an agreed statement of facts, on consideration of which the trial court dismissed the action. The plaintiff has appealed.

The only question involved, is whether the respondents,

¹Reported in 105 Pac. 463.

Joseph Hall and wife, owners of the real estate, were entitled to claim that it was exempt as their homestead, against appellant's lien. From the agreed statement of facts, it appears that the lien of appellant was valid; that he was entitled to judgment for \$31.75 debt, \$25 attorney's fees, and a decree of foreclosure, provided his claim of lien was not defeated by respondents' subsequent declaration of homestead; that the respondents, Joseph Hall and wife, acquired the real estate by purchase from the defendants Goodsell and wife; that early in the year 1908 they erected a dwelling house thereon, appellant furnishing part of the labor and materials used in its construction, for which he claimed his lien; that respondents had entered into possession; that appellant prepared, filed, and recorded a timely and statutory notice of lien, and that on September 22, 1908, after the commencement of this action, the respondent Joseph Hall, as the head of a family, made, executed, acknowledged, and recorded a declaration of homestead in and to the property under the provisions of Bal. Code, § 5485 *et seq.* The trial court erroneously held that such a declaration of homestead destroyed appellant's lien and prevented its foreclosure. The lien having attached before the declaration of homestead was made, appellant was entitled to a foreclosure decree. In *Hookway v. Thompson*, *ante* p. 57, 105 Pac. 158, this court recently held that a mortgage executed by a husband upon his separate property constituted a valid and enforceable lien, as against a subsequent declaration of homestead made by his wife. In other words, it was held that the mortgage lien created prior to the declaration of homestead could be foreclosed after and notwithstanding the making and recording of such declaration. Appellant's lien for work and labor had, under his recorded notice, attached to the property before the respondent Joseph Hall filed his declaration of homestead. It was not thereby destroyed, and appellant was entitled to a decree of foreclosure.

The judgment is reversed, and the cause remanded with

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instructions to enter a judgment and decree of foreclosure in appellant's favor, in accordance with the agreed statement of facts.

RUDKIN, C. J., MOUNT, PARKER, and DUNBAR, JJ., concur.

[No. 8227. Department Two. December 10, 1909.]

JOHN G. PRICE *et al.*, Appellants, v. A. O. LOE *et al.*,
Respondents.¹

PUBLIC LANDS—STATE DEED—COLLATERAL ATTACK. A state deed of tide lands cannot be collaterally attacked on account of alleged defects in assignments of the land contract to the grantee, after the commissioner of public lands has approved the assignments and issued the deed.

VENDOR AND PURCHASER—RESCISSION BY VENDEE—RECOVERY OF PRICE. Where the vendees made captious and technical objections to the vendor's title for the purpose of preventing performance within the time limit, but time was not of the essence and the vendors tendered complete performance prior to any claim of forfeiture, the vendees cannot recover earnest money paid.

Appeal from a judgment of the superior court for King county, Kauffman, J., entered December 29, 1908, dismissing an action on contract, after a trial on the merits before the court without a jury. Affirmed.

Shank & Smith, for appellants.

Douglas, Lane & Douglas, for respondents.

CROW, J.—This action was commenced by John G. Price and A. G. Boyd against A. O. Loe and James E. Stevens, to recover \$500, part payment on a contract to purchase real estate, which contract they allege was breached by the defendants. On a trial without a jury, and without any findings being made, the action was dismissed. The plaintiffs have appealed.

¹Reported in 105 Pac. 469.

On January 12, 1906, the appellants and Feeney & Pettingill, claimed by appellants to have been agents for the respondents, executed the following written agreement:

"Seattle, Wash., Jan. 12, 1906.

"Received from John G. Price & A. G. Boyd the sum of \$500 to apply on contract for the purchase of lots 25, 26 and 27, Block 433, Seattle Tide Lands, Seattle, Wash. The full purchase price of said property to be \$12,000; payable as follows: \$6,000, cash in hand, (including the amount of this receipt) and balance on or before 3 years, with interest on deferred payments at 6 per cent per annum until paid. The said purchaser shall be furnished a complete abstract showing a good and sufficient title to said property and allowed 5 days for examination thereof; whereupon he agrees to complete the purchase in the manner and upon the terms herein; and that in case of his failure so to do the said sum of money hereby receipted for shall, at the option of the undersigned, be forfeited as liquidated damages. It is further agreed that in the event of failure to convey good and sufficient title within 30 days from date hereof, the said sum of money shall be refunded. It is understood that purchasers are to be allowed at least 15 days from date hereof before making further payment. (Signed) Feeney & Pettingill, Agent.

"Subject to the owner's approval, I hereby agree to the above provisions. (Signed) J. G. Price, A. G. Boyd, Purchaser."

Respondents contend that they never saw or heard of this instrument until after the appellants had claimed its forfeiture; that Feeney & Pettingill were agents for appellants; that respondents never listed their property with Feeney & Pettingill, who came to them with a proposition to buy; that they paid respondents \$500 cash; and that respondents thereupon executed and delivered to them the following receipt pleaded in their answer:

"Seattle, Jan. 12, 1906.

"Received of Feeney & Pettingill, Agents, Five Hundred Dollars as earnest money on purchase price of lots 25, 26 and 27, Block 433, Seattle Tide Lands, balance Eleven

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Thousand Five Hundred Dollars payable as follows: Fifty Five Hundred Dollars cash in 15 days, and Six Thousand dollars cash on or before 3 years at 6 per cent per annum. Abstract of title to be delivered and good title to be conveyed by warranty deed and free from all incumbrance and liens. Subject to fill, charges for.

"Dated Jan. 12, 1906. A. O. Loe, James E. Stevens;"

that respondents never made, ratified, approved, or executed any other agreement; that they were to pay a commission to Feeney & Pettingill, although Feeney & Pettingill were agents of the appellants; that the respondents tendered performance of their contract on or about February 10, 1906, and again on or about February 20, 1906; that they have at all times since been able, ready, and willing to complete the sale and transfer a good title to appellants, and that appellants have at all times failed to perform or tender performance on their part.

The evidence shows that on January 25, 1906, an abstract of title was delivered by respondents to appellants, whose attorney on January 30, after examination, rejected the same, without stating his specific objections; that on February 4, 1906, an extended abstract was delivered by respondents to appellants, whose attorney on February 9 returned it with a written opinion specifically stating two classes of objections: (1) objections pertaining to a contract of sale for the tide lands, and to assignments of the contract made prior to the issuance and delivery of the state patent to the Ferry-Leary Land Company, a corporation, from which corporation respondents deraign their title; and (2) objections to certain alleged defects in the title, subsequent to the patent. The respondents were ready, willing and able to correct the latter objections by complying with all reasonable requirements made by the appellants relative to the title subsequent to patent, and did so within the thirty days named by the appellants' alleged contract, and for that reason we will not consider such objections. From the entire record we conclude that the controlling objections to the title, upon

which appellants relied, pertained only to proceedings had prior to the issuance of the patent, all other objections being either waived by appellants or promptly cured by the respondents, within thirty days after January 12, 1906.

As to the objections to proceedings had prior to the issuance of the patent, the respondents claim that they were technical and without merit; that respondents never made, ratified, approved, or executed any contract requiring them to convey a good and sufficient title within thirty days after January 12, 1906; that, without admitting the validity of the objections made, respondents did in fact fully correct and remove the same on or before February 20, 1906; that they tendered by good and sufficient deeds of conveyance a full and complete performance of their contract to sell, doing so prior to February 10, 1906, and again on or about February 20, 1906; that the market value of tide lands rapidly depreciated immediately after January 12, 1906; that the respondents were damaged in the sum of \$2,000 by reason of appellants' failure to complete their contract to purchase, and that appellants' technical and captious objections were made to afford them an excuse for refusing the completion of their contract to purchase, to aid them in recovering their cash payment, and to enable them to avoid loss resulting from the depreciation of value in tide lands. The trial court excluded competent evidence offered by the respondents in support of their contentions that the land had depreciated in value, and that they had been damaged; but sufficient competent evidence was admitted to sustain all of respondents' other contentions, and the action was therefore properly dismissed.

The abstract of title, which is in the record, shows that the state of Washington, on December 15, 1898, issued a contract of sale for the tide lands in question to one Thomas Flint, who with his wife, Mary Flint, on January 2, 1890, by written assignment, transferred the contract to his son,

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Thomas Flint, Jr.; that the assignment was, on May 12, 1900, acknowledged by Thomas Flint; that later Thomas Flint died testate; that after his death, Mary Flint, his widow, acknowledged the assignment she and her husband had jointly made during his lifetime; that the assignment was approved by the state commissioner of public lands; that Thomas Flint, Jr., on December 11, 1905, executed, acknowledged, and delivered an assignment of the contract to the Ferry-Leary Land Company, a corporation, which was also approved by the state commissioner of public lands; that on December 26, 1905, the state executed and delivered a patent for the land to the Ferry-Leary Land Company, from which company the respondents deraigned title. The appellants' attorney who examined the abstract questioned the sufficiency of the assignment from Thomas Flint and Mary Flint, his wife, to Thomas Flint, Jr., by reason of the fact that it had not been acknowledged by Mary Flint prior to the death of her husband. He also attacked the sufficiency of the assignment from Thomas Flint, Jr., to the Ferry-Leary Land Company by reason of the fact that it did not disclose whether the assignor was a married man, and, for the further reason that it was not executed by the assignor's wife, if he had one. Both assignments however were approved by the state commissioner of public lands, and subsequently the state in pursuance thereof issued a patent to the Ferry-Leary Land Company.

In *Welsh v. Callvert*, 34 Wash. 250, 75 Pac. 871, this court said:

"The deed, having been made by the state, and purporting to convey a portion of its public lands, is analogous to a patent issued by the United States for a portion of the public domain, and is governed by similar legal principles. The state has created a land department with administrative and executive functions similar to the land department of the general government. That department is authorized to supervise the proceedings by which title is sought to be ob-

tained to any portion of the state's public lands. Having supervised such proceedings in a given case, and having caused the deed of the state to issue, it becomes in effect, the patent of the state, and cannot, under the rules established as to Federal land patents, be collaterally attacked."

On the authority of this case, we do not think the appellants were in a position to question the validity of the patent issued by the state, or the title of respondents thereunder, or to make a collateral attack upon the same. In any event, the respondents, without conceding any merit in the objections made by the appellants to the assignment of the contract of sale, corrected the same by proper written instruments, which were tendered to the appellant on or before February 20, 1906. We do not deem it necessary to enter upon a further discussion of appellant's various objections to the title. Without regard to the question whether Feeney & Pettingill were their agents to purchase, or agents of respondents to sell, the evidence fails to show that respondents approved the written contract executed by Feeney & Pettingill, upon which appellants rely, and which by its terms contemplated that it should be subject to their approval. Nor was there any evidence of the execution of any agreement by respondents, other than the one signed and pleaded by them, upon which \$500 was paid by Feeney & Pettingill. The evidence establishes the fact that respondents promptly complied with all of appellants' requirements to perfect the title, although they were captious and technical, without merit, and must have been raised with the sole design of preventing a performance of the contract by respondents within the thirty-day limit claimed by appellants. We further find that the respondents tendered full performance of the contract prior to any claim of forfeiture by appellants, and that time was not the essence of the contract which respondents actually made. The trial court ruled strictly against respondents in the matter of admitting evidence, but found

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in their favor. The evidence admitted by its clear preponderance sustains such finding.

The judgment is affirmed.

RUDKIN, C. J., MOUNT, DUNBAR, and PARKER, JJ., concur.

[No. 8194. Department Two. December 10, 1909.]

In re Application of MAUDE FIELDS for a Writ of Habeas Corpus.

MAUDE FIELDS, *Appellant*, v. ARTHUR W. DEMING *et al.*,
*Respondents.*¹

ADOPTION—ABANDONED CHILD—GOOD FAITH — EVIDENCE — COMPETENCY. Evidence of an attempted adoption of a child by a foundling hospital is competent to show the intention and good faith of foster parents receiving the child from the hospital and adopting it.

ADOPTION—ABANDONED CHILD—EVIDENCE—SUFFICIENCY. Evidence of a founder of a foundling hospital and of the superintendent, that a child brought there by the mother was abandoned and a written release signed, is sufficient, although contradicted, to sustain findings that the child was abandoned by the mother.

SAME—ABANDONMENT—EVIDENCE—SUFFICIENCY. An abandonment of a child is shown where *habeas corpus* proceedings by the mother to secure possession of the child were voluntarily dismissed in 1898, and the child was left in the possession of adoptive parents for ten years.

PARENT AND CHILD—RIGHT TO CUSTODY—ADOPTION. In deciding the right to a child as between a mother who had abandoned it, and adoptive parents, the pecuniary standing of the parties is not to be considered; but the welfare of the child is of grave importance and may be made controlling.

SAME—EVIDENCE—SUFFICIENCY. A mother is not entitled to the custody of her boy, and the same should be left in the custody of foster parents, where it appears that the child was illegitimate and had been abandoned in infancy to a foundling hospital and a release signed; that *habeas corpus* proceedings by the mother to secure possession were abandoned by her, and nothing done for ten years,

¹Reported in 105 Pac. 466.

during which time the child had been brought up by foster parents and an attachment and environment created distinctly different from what would be the case in a change of guardianship, and the mother was unable to give him as good a home or attention as he now had.

Appeal from a judgment of the superior court for Whatcom county, Neterer, J., entered December 28, 1908, upon findings in favor of the defendants, dismissing habeas corpus proceedings, after a trial on the merits. Affirmed.

Craven & Greene, for appellant.

Hadley, Hadley & Abbott, for respondents.

DUNBAR, J.—This action is brought by appellant, Maude Fields, to recover the possession of the body and person of her son, William Barnes Fields, a minor, who was, at the time of the trial, of the age of thirteen years, and who is now residing with and under the control of Arthur W. Deming and Lulu M. Deming, his wife, respondents herein.

The appellant was an orphan at the age of fourteen years, striving to earn her own living, and when fifteen years of age met one William Barnes who, under promise of marriage, accomplished her downfall, and thereafter refused to carry out his promise of marriage. On the 10th day of September, 1895, the appellant gave birth to the child, William Barnes Fields, at the Female Hospital in the city of St. Louis. She remained in the hospital until about the 26th day of September, 1895, when she sought and obtained employment as a wet nurse at a compensation of \$30 a month, and she placed her own child in the care of third persons, first paying \$12 a month and later \$15 a month for a wet nurse for her child. According to her testimony, the child did not seem to thrive under the care he was receiving, and she concluded, under the advice of others that it was best to take him to the hospital for treatment, and on the 8th day of June, 1896, she did take the child to a place that she says she was informed was a child hospital, and was known as the Bethesda, and that at this time she was weak and ill. She was accom-

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panied to the hospital by a negress who had been employed by her as a wet nurse for the child.

At this point the real controversy commences, the appellant testifying, in substance, that she did not intend to do more than to leave the child at the hospital for a short time until she should be able to take care of it herself; that in about three weeks from the time she left it, she went to see the child, and was informed that it had been placed in a family, and that it was against the rules of the hospital to inform the mother of the destination of the child; that it appeared that this was a foundling hospital where babies were received for the purpose of finding them good homes, but that she did not know when she took the child there that it was a foundling hospital, and did not wish to, and did not, abandon the child or authorize the hospital to do anything but exercise temporary care over the child; that when she found the child was gone, she was prostrated with grief which was followed by illness, and that as soon as she was able to do so she employed a detective, one Arthur Welt, to find the child.

To condense the recital, the child was located in the home of the respondents, and a writ of habeas corpus was sued out in a competent court in the city of St. Louis, Missouri, in July, 1898. The respondent answered the writ, bringing the child into court. The cause was continued a few days, and when it was called for trial again it was dismissed without prejudice on motion of petitioner's counsel, for the reason, according to her statement, that she was not able to attend court and was then in the country some distance from St. Louis. The appellant undertakes to make some point on the alleged fact that she did not authorize the dismissal of the case, but only its continuance, but she herself testifies that she wrote to the detective, who seems to have had the matter in charge, to continue the case indefinitely, which amounts to about the same thing as, of course, the case could not be continued indefinitely. She remained in the country without any further correspondence on the subject until the

last of October or first of November, when she returned to the city. No further attention was paid to the matter, and it does not appear that there was any further correspondence about it until her return to the city some months afterwards, when she was informed that the case had been dismissed. Appellant testified that she again took up the search through the same detective, but was never able to locate the respondents until she heard of them in the year 1905, when she was informed that they lived in the city of Bellingham, Washington, and that as soon as she was able to earn the means necessary for the prosecution of the suit, she commenced the same in the month of June, 1908. The testimony concerning the attempt to locate the respondents was the testimony of the appellant as to what was told her by detective Welt, he not having been called as a witness in the case.

The respondents introduced Mrs. Roger Haynes, the founder and directrix of the Bethesda hospital, the home where the baby was left. She testified that she knew of the circumstances under which the baby was left at the home, and that the child was a deserted child, abandoned by its mother, who at the time she brought it there signed papers of abandonment; that it was neglected, dirty, and sickly. The testimony of this witness was also largely hearsay, being a recital of what was told her by the superintendent and other employees of the place, but she remembered the child, its name, and its installation in the hospital, testifying that it remained in the hospital about a year, and that during that time its mother never came to see it and never was heard of until after the child had been taken and adopted by the respondents in this case. She was, however, unable to produce the relinquishment which she said the mother made, her testimony being to the effect that she had searched in the records for it, her explanation of its loss being that the hospital was in a torn up and disorderly condition just at that time by reason of the building having been seriously damaged by a cyclone a day or two before that, and that just at that

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time they were moving into temporary quarters, and she thought it might have been lost in the confusion attending the moving.

Mrs. C. S. Nelson, who as Miss Schoenher was superintendent of the Bethesda foundling home at the time the baby was left there, testified that they were then in temporary quarters following the unroofing of their building by the tornado; that she distinctly remembered the baby William Barnes; that it was brought to the hospital on the 8th day of June, 1896, by its mother and a negress; that she met them at the door and that the mother said she had come to give the baby up if they would take it; that she informed the mother that the institution was a home for deserted babies, but that it also took in mothers with their babies if they chose to come, until such time as a home could be found for the babies; that appellant informed her that she did not wish to come; that she said she was willing to sign a paper to give the baby up; that she did sign such paper after having it read to her, and after having the form of relinquishment handed to her for her investigation; that the paper was signed and witnessed, and that she then delivered the paper to Mrs. Haynes, the directrix, who was the custodian of such papers; that the name of the child filled into the blank was William Barnes. She further testified that she had a vivid recollection of the circumstances by reason of the unfeeling acts of the mother, her language being: "She showed no feeling whatever. She did not touch the child nor kiss it good bye; so much so that I doubted in my own mind whether it was her own child." She testified that she remained at the home until the next January, and that the mother did not call to inquire for the child in three weeks, or at all during her stay there, and that she would have known it had she called. There was a great deal of other testimony on this point which it is impracticable to review, but what we have set forth is in substance the testimony adduced.

In answer to the testimony of the appellant that after the

dismissal of the cause in the city of St. Louis, she had attempted to locate the Demings, respondent Arthur Deming testified that he was served with the writ before mentioned at his place of business at the store of Meyer, Bannerman & Co., where he was superintendent for many years; that he continued in that employment until the summer of 1900, when he came to Washington, and that he could have been found there any day during business hours during that time. This testimony was corroborated by the wife of the respondent, by his employer, and by others. The fact seems to be firmly established. The testimony in this case is exceedingly voluminous, the record being very large. The court was liberal in allowing the introduction of testimony, and everything connected with the case or tending to throw light on the actions or motives of these parties was allowed to go into the record.

There seems to be two leading questions in the case. The first is, was the child abandoned by its mother before its adoption by the Demings? It may be stated here that the record shows that the respondents adopted or undertook to adopt this child under the laws of the state of Missouri, and whether or not it was a legal adoption binding on the mother, it is at least competent to show the intention and good faith of the respondents, and is probably binding upon them. The second proposition is, was there an abandonment of the custody of the child after the dismissal of the habeas corpus proceedings in July, 1898?

From a careful investigation of all the testimony in this case, and recognizing the pitiful condition of the mother, that she was grievously sinned against, and that the fault, if fault there was, was caused by inexperience on her part and by villainous wiles on the part of her seducer, we are forced to the conviction that the fact was that the intention of the appellant when she took the child to the hospital was to abandon it, in the sense of relinquishing all claims that she had upon it, so that it might be legally disposed of by the

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authorities of the hospital. We are also forced to the conclusion that there was an abandonment after the attempted recovery of the custody of the child in 1898. Ten years is a long time to leave a child in the custody of kind-hearted people who have seen fit to adopt it, when the tendency must be that mutual affection will spring up between the foster parents and the adopted child. The testimony in this case shows that there is a warm attachment and affection existing between the respondents and this child. It is impossible to read the record without concluding that that affection is as warm and abiding as the affection between a natural parent and child. These people have given this child all the advantages that could have been given to a child of their own. Little circumstances are testified to which show conclusively the feeling that existed. The foster father has looked with particular interest after the education of the boy, has helped him with his studies at home, not occasionally but constantly; testifies that he always heard his prayers of nights when his mother was not able to attend to him, and he administered the thousand and one little attentions that are only administered through the promptings of affection; that he was a sickly boy; that they have spent much for him in the way of medical services and attention, and devoted their own personal attention to him most faithfully; that the boy is impulsive, somewhat stubborn in disposition, and at the same time loving and affectionate. Certainly he is just at the age when he needs the restraining hand of a father.

The court found, among other things, that it was to the best interests and welfare of the child that he be and remain in the care and custody, and under the control, of said respondents, and that to transfer his care, custody, and control to the petitioner herein would be detrimental to the interests of said child and detrimental to his welfare. The learned counsel for the appellant complain of this finding and insist that the court based its conclusion in this case altogether upon the welfare of the child, inasmuch as the court

had previously found that the mother was a proper person to have the care and custody of the child. This finding of the court was as follows:

"That the petitioner resides in the said city of St. Louis, state of Missouri, in what has been designated by her as a flat, which she has rented and is now renting, which flat has been by her and is comfortably furnished and equipped for living purposes, and in which said flat rooms are let by her from time to time to female tenants who remain for irregular periods; that the petitioner is a seamstress, engaging principally in sewing and, in pursuing the same, the major portion of her work is done away from her home; that there are no other members of petitioner's family or other relatives residing with her; that petitioner is possessed of sufficient means to clothe, nurture, and educate said child in the schools of the said city of St. Louis, but is not possessed of sufficient means to maintain him in the position and station in life in which he is now being maintained by respondents, and to which he has been hitherto accustomed; that the petitioner is otherwise a suitable and proper person to have the care and custody of said child and is strongly attached to said child, and that said child has never known the petitioner until the institution of this proceeding."

So that the finding that the petitioner was qualified to have the possession of the child was somewhat modified by the facts found. There is no question but that, while the welfare of the child is of grave importance, the rights of the natural parent must also be taken into consideration. But, under the circumstances of this case, the rights of the foster parents must also be considered. And in taking into consideration the welfare of the child, it is not proper to consider the material wealth possessed by either the natural or foster parents, or to make comparisons in that regard, for the tendrils of parental affection entwine around the offspring of the poor with as much strength as they do around the children of the rich; if, indeed, with not greater strength by reason ordinarily of more intimate relationships and sacrifices that have to be made and which tend to strengthen mutual love and

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affection. Nor, looking exclusively at the welfare of the child, can it be said that the financial condition of the parents respectively should be taken into consideration, for it is a matter of common knowledge to all thinking and observing people that the best men and women of our nation, if not of the world, came up through the gateway of industry, self-denial, and self-reliance. These efforts and sacrifices seem to be necessary to the moulding and rounding out of perfect individuals. At the same time, it must be apparent that, where a child has been brought up by foster parents in an environment that is distinctly different from the environment to which he would be submitted by a change of guardianship, a revulsion of feeling would be liable to occur which would lead to embarrassments and misery. In this case, looking at the question strictly from the standpoint of the boy's welfare, the mother would not be able to give him the attention which at this age he sadly stands in need of. She would not be able to give him a name, for he has none; and if he were uprooted from the home and affection which now warm and protect him, and transplanted to the environment described by the mother as her home, the probabilities are that it would result in discontent and misery to both mother and son.

There are many other questions that were raised in the trial of the case which we do not deem it necessary or best to discuss, but for the reasons assigned we think the court acted wisely in reaching the conclusion that it did, and the judgment will therefore be affirmed.

RUDKIN, C. J., CROW, MOUNT, and PARKER, JJ., concur.

[No. 8195. Department Two. December 10, 1909.]

THE STATE OF WASHINGTON, *Appellant*, v. FRANK Z.
HEUSTON *et al.*, *Respondents*¹

PUBLIC LANDS—SALE—LANDS SUBJECT TO SALE—OYSTER BEDS—FINDING OF COMMISSIONERS—EFFECT—FRAUD IN APPLICATION FOR SALE. Where the law required the state oyster commission to examine all natural oyster beds and establish reserves, and the commission established reserves in the vicinity of certain lands which were excluded from the reserve, making the same subject to sale, and such lands were afterwards sold by the state, the state is concluded by the acts of the commissioners, who are presumed to have done their duty, in the absence of fraud or improper motive on their part, and cannot attack the deeds on the ground that the original applicants for the land knew that the same contained natural oyster beds and had made false affidavits to secure the sale of the land.

Appeal from a judgment of the superior court for Pacific county, Rice, J., entered April 1, 1909, dismissing an action to cancel state deeds to oyster lands, upon sustaining objections to evidence offered. Affirmed.

The Attorney General and *John I. O'Phelan*, for appellant, contended that natural oyster beds have at all times been reserved from sale. Laws 1873, p. 463; Laws 1877, p. 306; Laws 1891, p. 208, ch. 110; Laws 1895, p. 527, ch. 178, § 83; Laws 1897, p. 298, ch. 107, § 9; Laws 1899, p. 270, ch. 134. A natural oyster bed is one where oysters are growing naturally in sufficient quantities to be of practical value. Laws 1897, p. 301, ch. 107, § 8; *State v. Willis*, 104 N. C. 764, 10 S. E. 764; *People v. Hazen*, 121 N. Y. 313, 24 N. E. 484; *Fleet v. Hegeman*, 14 Wend. (N. Y.) 42. Natural oyster beds cannot be sold, but must be retained as part of the public domain for the use of the people. *Averill v. Hull*, 37 Conn. 320; *State ex rel. Blount v. Spencer*, 114 N. C. 770, 19 S. E. 93; *Cook v. Raymond*, 66 Conn. 285; *Clinton v. Bacon*, 56 Conn. 508; *Hurst v. Dulany*, 84 Va.

¹Reported in 105 Pac. 474.

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Citations of Counsel.

701, 5 S. E. 802; *Cain v. Simonson* (Ala.), 39 South. 571; *People v. Hazen*, *supra*; *State ex rel. Smith v. Forrest*, 8 Wash. 610, 36 Pac. 686, 1120. A deed or patent thereof is absolutely void. *Cook v. Raymond*, *Clinton v. Bacon*, and *State ex rel. Smith v. Forrest*, *supra*; 26 Am. & Eng. Ency. Law (2d ed.), 394-395; *Morton v. Nebraska*, 21 Wall. 660, 22 L. Ed. 639; *Burfenning v. Chicago etc. R. Co.*, 163 U. S. 321, 16 Sup. Ct. 1018, 41 L. Ed. 175; *Id.*, 41 Fed. 176; *Barry v. Gamble*, 3 How. 32, 11 L. Ed. 479; *Clark v. Herington*, 186 U. S. 206, 22 Sup. Ct. 872, 46 L. Ed. 1128; *Garrard v. Silver Peak Mines*, 94 Fed. 983; *Stewart v. Alstock*, 22 Ore. 182, 29 Pac. 553; *Doolan v. Carr*, 125 U. S. 618, 8 Sup. Ct. 1228, 31 L. Ed. 844; *Sherman v. Buick*, 93 U. S. 209, 23 L. Ed. 849. Such deed transfers no title. *United States v. Stone*, 2 Wall. 525, 17 L. Ed. 765; *Burfenning v. Chicago etc. R. Co.*, and *Morton v. Nebraska*, *supra*. The character of the land at the time it was applied for may be shown. 26 Am. & Eng. Ency. Law (2d ed.), 396; *United States v. Minor*, 114 U. S. 233, 5 Sup. Ct. 836, 29 L. Ed. 110; *United States v. Central Pac. R. Co.*, 84 Fed. 218; *United States v. Coos Bay Wagon-Road Co.*, 89 Fed. 151; *Mullan v. United States*, 118 U. S. 271, 6 Sup. Ct. 1041, 30 L. Ed. 170; *Western Pac. R. Co. v. United States*, 108 U. S. 510, 2 Sup. Ct. 802, 27 L. Ed. 806; *Smelting Co. v. Kemp*, 104 U. S. 636, 26 L. Ed. 875; *Wright v. Roseberry*, 121 U. S. 488, 7 Sup. Ct. 985, 30 L. Ed. 1039; *Garland v. Wynn*, 61 U. S. 6, 15 L. Ed. 801; *Pierce v. Frace*, 157 U. S. 372, 15 Sup. Ct. 635, 39 L. Ed. 737; *King v. McAndrews*, 111 Fed. 860; *United States v. Throckmorton*, 98 U. S. 61, 25 L. Ed. 93; *Barden v. Northern Pac. R. Co.*, 154 U. S. 288, 14 Sup. Ct. 1030, 38 L. Ed. 992; *United States v. Hughes*, 11 How. 552, 13 L. Ed. 809; *Moore v. Robbins*, 96 U. S. 530, 24 L. Ed. 848; *United States v. Beebe*, 127 U. S. 338, 8 Sup. Ct. 1083, 32 L. Ed. 121; *Lake Superior Ship Canal R. & Iron Co. v. Cunningham*, 155 U. S. 354, 15 Sup. Ct. 103, 39 L. Ed. 183. The notice was not pub-

lished for three successive weeks. *Hill v. Faison*, 27 Tex. 428, 49 L. R. A. 219; *Meredith v. Chancey*, 59 Ind. 466; *Smith v. Rowles*, 85 Ind. 264; *Eric Sav. Fund & Bldg. Ass'n v. Thompson*, 13 Phila. 511; *Athens Nat. Bank v. Frost*, 3 Pa. Dist. R. 601; *Steuart v. Meyer*, 54 Md. 454. The fraud of the applicants entitles the state to a cancellation of the deed. *United States v. Minor*, *United States v. Central R. Co.*, *United States v. Throckmorton*, *United States v. Beebe*, and *State ex rel. Smith v. Forrest*, *supra*.

T. W. Hammond (*H. W. B. Hewen* and *E. R. York*, of counsel), for respondents, contended, that the publication was sufficient. Bal. Code, § 2237; 17 Ency. Plead & Prac., 98; *Southern Indiana R. Co. v. Indianapolis & L. R. Co.*, 168 Ind. 360, 81 N. E. 65; *Alexander v. Alexander*, 26 Neb. 68, 41 N. W. 1065; *Security Co. of Hartford v. Arbuckle*, 123 Ind. 518, 24 N. E. 329; *Wells v. Kelly*, 11 Utah 421, 40 Pac. 705; *Bachelor v. Bachelor*, 1 Mass. 256; *State ex rel. Boyd v. Superior Court*, 6 Wash. 352, 33 Pac. 827. The state could not complain of the publication. *Hinton v. Knott*, 134 Ill. App. 294; *Le Marchel v. Teagarden*, 152 Fed. 662; *Oregon Short Line R. Co. v. Stalker*, 14 Idaho 371, 94 Pac. 59. Fraud of the applicants would not be sufficient ground for the cancellation of the deed. *Woolsey v. Haynes*, 165 Fed. 391; *Wiseman v. Eastman*, 21 Wash. 163, 57 Pac. 398; *Le Marchel v. Teagarden*, *supra*; *Pater-son v. Ogden*, 141 Cal. 43, 74 Pac. 443, 99 Am. St. 31; *Miller v. Margerie*, 149 Fed. 694; *King v. McAndrews*, 111 Fed. 860. The statements in the affidavits were not made with intent that they be acted on. *Thorp v. Smith*, 18 Wash. 277, 51 Pac. 381; *Tacoma v. Tacoma Light & Water Co.*, 16 Wash. 288, 47 Pac. 738; *United States v. Detroit Timber & Lumber Co.*, 124 Fed. 393; *United States v. Clark*, 125 Fed. 774. Whether the land constituted a natural oyster bed is matter of opinion, and the state could not rely thereon. *State v. Willis*, 104 N. C. 764, 10 S. E. 764; *Baker-Boyer*

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Citations of Counsel.

Nat. Bank v. Hughson, 5 Wash. 100, 31 Pac. 423; *Baker v. Bicknell*, 14 Wash. 29, 44 Pac. 107; *Van Horn v. O'Conner*, 42 Wash. 513, 85 Pac. 260; *Hubbell v. Meigs*, 50 N. Y. 480; Bishop, Non-Contract Law, § 325. The state had equal knowledge with the respondents at the time the deed was issued, and the law therefore cannot grant it relief. *Pigott v. Graham*, 48 Wash. 348, 93 Pac. 435, 14 L. R. A. (N. S.) 1176; *Hines v. Royce*, 127 Mo. App. 718, 106 S. W. 1091; *Irby v. Tilsley*, 41 Wash. 211, 83 Pac. 97; *Walsh v. Bushell*, 26 Wash. 576, 67 Pac. 216; *Hulet v. Achey*, 39 Wash. 91, 80 Pac. 1105; *Grinrod v. Anglo-American Bond Co.*, 34 Mont. 169, 85 Pac. 891; *Power & Bro. v. Turner*, 37 Mont. 521, 97 Pac. 950; *Ransier v. Dwyer*, 149 Mich. 487, 112 N. W. 1120; *Pittsburgh Life & Trust Co. v. Northern Cent. Life Ins. Co.*, 140 Fed. 888. The state was not deceived and did not act on the representations. *Whitehurst v. Life Ins. Co. of Virginia*, 149 N. C. 273, 62 S. E. 1067; *Hutchason v. Spinks*, 3 Cal. App. 291, 85 Pac. 132; *Clark Co. v. Rice*, 127 Wis. 451, 106 N. W. 231; *Belding v. King*, 159 Fed. 411; *Foster v. Oberreich*, 230 Ill. 525, 82 N. E. 858. The action of the state oyster commission concludes all inquiry concerning the nature of the lands. *Colorado Coal & Iron Co. v. United States*, 123 U. S. 307, 8 Sup. Ct. 131, 31 L. Ed. 182; *King v. Andrews*, *supra*; *United States v. Winona & St. P. R. Co.*, 67 Fed. 948; *De Cambra v. Rogers*, 189 U. S. 119, 23 Sup. Ct. 519, 47 L. Ed. 734; *Wiseman v. Eastman*, *supra*; *Kerns v. Lee*, 142 Fed. 985; *French v. Fyan*, 93 U. S. 169, 23 L. Ed. 812; *Rogers Locomotive Machine Works v. American Emigrant Co.*, 164 U. S. 559, 17 Sup. Ct. 188, 41 L. Ed. 552; *McCormick v. Hayes*, 159 U. S. 332, 16 Sup. Ct. 37, 40 L. Ed. 171; *White v. Petty*, 57 Conn. 576, 18 Atl. 253, 19 Atl. 152; *State v. Nash*, 62 Conn. 47, 25 Atl. 451; *Small v. Lutz*, 41 Ore. 570, 67 Pac. 421, 69 Pac. 825; *Warner Valley Stock Co. v. Morrow*, 48 Ore. 258, 86 Pac. 369; *United States v. Mackintosh*, 85 Fed. 338. Their action is not subject to review by the courts.

Lindsay v. Hawes, 2 Black 554, 17 L. Ed. 265; *Trinwith v. Smith*, 42 Ore. 239, 70 Pac. 816; *Stangar v. Roads*, 41 Wash. 583, 84 Pac. 405; *Cragin v. Powell*, 128 U. S. 691, 9 Sup. Ct. 203, 32 L. Ed. 566; *Haydel v. Dufresne*, 17 How. 23, 15 L. Ed. 115; *Tolleston Club of Chicago v. State*, 141 Ind. 197, 38 N. E. 214, 40 N. E. 690. The lands were subject to sale. *State ex rel. Smith v. Forrest*, 8 Wash. 610, 36 Pac. 686, 1120; *Lockhart v. Johnson*, 181 U. S. 516, 21 Sup. Ct. 665, 45 L. Ed. 979; *White v. Petty*, *supra*.

MOUNT, J.—This action was brought by the state to set aside certain deeds issued by the commissioner of public lands, to the respondents, for certain described oyster lands. It is alleged, that the lands described were natural oyster beds at the time applications were made to purchase the same; that the lands were reserved from sale, and that the applicants falsely and fraudulently made affidavits to the effect that the lands applied for were not natural oyster beds, and thereby intended to, and did, deceive the officials in charge of the land department, and thereby the applications were granted and deeds issued upon the *ex parte* affidavits of the applicants. These allegations were all denied by the answer. At the trial the appellant offered to prove that the lands in controversy had been natural oyster beds from the year 1854 down to the time of the trial, and that,

“Such applicants for the land in controversy knew the condition of these lands with reference to the quantity of oysters upon them at the time of making their application, and that each of the applicants knew that the lands supported oysters growing naturally in sufficient quantities to be of value as a source of oyster supply at the time they made their applications to purchase the same; that the applicants knew the lands in controversy supported oysters growing thereon naturally in sufficient quantity to be valuable as a source of oyster supply at the time of making the application, or by the use of reasonable diligence they could have ascertained those facts by an inspection of the lands.”

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The court excluded this evidence. Whereupon the plaintiff rested, and the court dismissed the action. Plaintiff has appealed, and bases error on the ruling of the court excluding this evidence.

The facts as shown by the pleadings and evidence introduced are, in substance, that on February 25, 1903, one Alexander Thornely and six other persons made application to purchase the several tracts of land involved here, for the purpose of oyster culture. These applicants filed the usual affidavits in the land office, stating among other things that they had full knowledge of the character of the lands; that there were no natural oyster beds thereon, and that the lands were suitable for the cultivation of oysters. The statute then in force provided that, on the filing of such applications, the commissioner of public lands should require the county board of oyster commissioners to immediately inspect the lands applied for and report to him the character of such lands and, in case the report showed that the lands were natural oyster beds, the commissioner should investigate the matter at a public hearing where the lands were situated and, unless it should conclusively appear that the county board was in error, the application should be denied. Laws 1897, p. 298. In March, 1903, while the applications were pending before the land office, the legislature passed an act creating a state oyster commission. Laws 1903, p. 340, ch. 166. This act became effective immediately, and provided that such commission should consist of the governor, commissioner of public lands, and the fish commissioner, and defined the duties of this commission, at § 5, to:

“(1) Examine all existing oyster reserves and to do or cause to be done such things as may be deemed advisable, to conserve, protect, and develop said reserves as now established and that may be hereafter established, and to make such rules and regulations as may be found necessary or desirable to carry into effect the provisions of this act.

“(2) To immediately examine all tide or oyster lands be-

longing to the state (except tide lands of the first class and lands hereinabove provided for) and to survey, plat and establish thereon what shall be and constitute oyster reserves for the future.

"(3) To cause a survey or re-survey of all the state oyster land reserves now existing or to be established by the said commission, to be made before the first day of October, 1903, or as soon thereafter as possible, and shall have each angle of the boundary line indicated by a stone," etc.

Section 6 of that act also provided as follows: "The tide land within all oyster reserves established and surveyed and platted by said state oyster commission shall be forever reserved from sale or lease." Laws 1903, p. 340. After the passage of this act, and in August, 1903, the commissioner of public lands referred the applications above mentioned to the local board of oyster land commissioners of Pacific county, wherein the lands were located, requiring that board to answer the following questions:

"(1) Is the land or any portion thereof a natural oyster bed.

"(2) If this land or any part of it is a natural oyster bed, is it necessary in order to secure adequate protection to it to retain it or any part of it in the public domain.

"(3) Whether the land or any portion thereof having been a natural oyster bed within ten years past, may reasonably be expected to again become such within ten years in the future."

On April 5, 1904, the said oyster land commission entered an order establishing the Long Island state reserve, in Pacific county, but the lands in controversy were excluded from that reserve. In the months of November and December, 1904, notices of the application to purchase were published by the commissioner of public lands. On November 25, 1904, the local board of oyster commissioners reported upon the questions theretofore submitted to them, answering all those questions in the affirmative, and to the effect that the lands applied for were a natural oyster bed necessary to be retained as public domain, and that the same have been reserved by the

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state. Before or about the time this report was made, an action in mandamus was brought on behalf of the applicants to compel the commissioner of public lands to act upon the applications to purchase, without regard to the reference of such applications to the county board, and without regard to any report which that board should make. Upon a trial of the case, the mandate was issued, and an appeal was thereupon prosecuted to this court, and upon the appeal it was held that the act of 1903 superseded the act of 1897, and that the authority of the county board of oyster land commissioners was superseded by the state oyster commission provided for by the act of 1903; and the judgment of the lower court in that case was affirmed. *State ex rel. Hammond v. Ross*, 39 Wash. 233, 81 Pac. 725.

Thereafter, on July 21, 1905, the applications to purchase were allowed and contracts were issued to the applicants by the commissioner of public lands. On April 1, 1906, the state oyster commission made certain corrections in the Long Island oyster reserve, and ordered and established the reserve by metes and bounds, which reserve did not include the lands in dispute. Maps and descriptions of this reserve were filed in the office of the county auditor of Pacific county. Payments were made by the applicants as provided for in their contracts. These contracts were subsequently assigned to the respondents in this case by approval of the commissioner of public lands, and when the contracts were fully paid, viz., on April 13, 1908, deeds were issued by the commissioner of public lands to the respondents. In November 1908, this action was begun to set aside these deeds.

Prior to the enactment of the statute of 1903, it was the policy of the state, as declared by numerous acts, to reserve the natural oyster beds of the state from sale, but the act of 1903 made it the duty of the state oyster commission to examine all oyster reserves and all the tide and oyster land belonging to the state, and to survey, plat and establish thereon oyster reserves for the future. Section 6 provided,

“that tide lands within all oyster reserves established and surveyed and platted by said state oyster commission shall be forever reserved from sale.” Such lands without these reserves were not affected thereby, and of course were subject to sale or lease. The authority of the state oyster commission to establish oyster reserves is not questioned. That commission did establish an oyster reserve in the vicinity of the land in question, and excluded these lands from that reserve. It is not claimed in the pleadings that the state oyster commission was influenced by fraud or any other improper motive in excluding these lands from such reserve, and no proof was offered of any such fact; but it is claimed that the applicants, prior to the time when the reserves were created, had filed applications to purchase the lands in question, and had made false and fraudulent affidavits that the lands applied for contained no natural oyster beds, and that the state oyster commission was induced thereby to exclude the lands in question from the reserve.

It must be presumed, in the absence of proof to the contrary, that the state board did its duty and examined these lands, investigated the character of the land and the reports in reference thereto, and in their judgment concluded that the lands did not contain natural oyster beds. This board was the agent of the state, clothed with authority to examine tide lands and establish oyster reserves thereon, and for that purpose had authority to include in such oyster reserves such lands as in their opinion were proper, and to exclude therefrom such lands as were not proper for such reserves. The state is bound by that conclusion and cannot now be heard to say that its agent was mistaken in his judgment, unless the board acted without authority, or was guilty of fraud or some other improper motive.

In *Quinby v. Conlan*, 104 U. S. 420, 26 L. Ed. 800, the supreme court of the United States said:

“It would lead to endless litigation, and be fruitful of evil, if a supervisory power were vested in the courts over the ac-

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tion of the numerous officers of the land department, on mere questions of fact presented for their determination. It is only when those officers have misconstrued the law applicable to the case, as established before the department, and thus have denied to parties rights which, upon a correct construction, would have been conceded to them, or where misrepresentations and fraud have been practiced, necessarily affecting their judgment, that the courts can, in a proper proceeding, interfere and refuse to give effect to their action. On this subject we have repeatedly, and with emphasis expressed our opinion, and the matter should be deemed settled."

See, also, *Steel v. St. Louis Smelting & Refining Co.*, 106 U. S. 447, 1 Sup. Ct. 389, 27 L. Ed. 226.

It follows, therefore, that the court did not err in refusing to hear evidence to the effect that the lands in question were in fact natural oyster beds, and that the applicants knew these facts at the time they filed their applications for the purchase of the land, because that was the question which was determined by the state oyster commission when the lands were excluded from the reserve. The exclusion of these lands from the reserve made them subject to sale or lease under the rules governing such lands. The authorities cited by the appellant, to the effect that a deed to the lands executed without authority of law is void, are therefore not in point here. The exclusion of the lands from the reserve established their character. The affidavits of the applicants that the lands were not natural oyster beds could not have misled the state oyster commission because, after the affidavits were made, that commission examined the lands as it was required to do and passed its judgment upon the conflicting opinions as to the character of the lands, and determined that the lands were not natural oyster beds, and such judgment is now conclusive.

We find no error in the record. The judgment is therefore affirmed.

RUDKIN, C. J., DUNBAR, CROW, and PARKER, JJ., concur.

[No. 8161. Department One. December 10, 1909.]

HELGA HELLIESEN, *Respondent*, v. SEATTLE ELECTRIC
COMPANY, *Appellant*.¹

STREET RAILROADS—CROSSINGS—CONTRIBUTORY NEGLIGENCE OF PEDESTRIAN—DUTY TO LOOK AND LISTEN. A pedestrian, struck at a crossing by a well lighted street car, at night, is guilty of contributory negligence, as a matter of law, although she testified that she looked east just a moment before stepping on the track and saw no car and heard no bell, where it appears that had she looked as she said she did she must have seen a lighted car about forty feet east of the crossing, approaching at ten miles an hour; since the rule that one need not stop, look and listen before crossing a street car track does not permit one to heedlessly and carelessly cross the track; the rights of the parties being equal.

SAME. In such case the test is, did the pedestrian use ordinary care, and the circumstances may be so conclusive as to make failure to look and listen, or such inattention as to know nothing of an approaching car, contributory negligence as a matter of law.

FULLERTON, J., dissents.

Appeal from a judgment of the superior court for King county, Gilliam, J., entered February 2, 1909, upon the verdict of a jury rendered in favor of the plaintiff, in an action for personal injuries sustained by a pedestrian struck by a street car. Reversed.

James B. Howe and *Hugh A. Tait*, for appellant.

Martin J. Lund (*Vince H. Faben*, of counsel), for respondent.

MORRIS, J.—On September 17, 1907, the respondent left the place where she was temporarily employed, to go to her home on the corner of Pine street and Bellevue avenue, Seattle. She walked west on the north side of Pine street, until she came to Bellevue avenue. When she reached the east side of Bellevue avenue, she saw two cars, one headed east and the

¹Reported in 105 Pac. 458.

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other west on the west side of Bellevue, which it appears was the usual stopping place for cars at that street intersection. She was then living on the southwest corner of these two streets, and thinking she had time to cross the track, before the east-bound car reached the east crossing, she started to cross Pine on the east side of Bellevue.

At the time she reached the crossing, it was dark, about 7:30 p. m., and after seeing the situation of the two cars on the west side of the crossing, she says she started across and when, using her own language, "a little out from the crossing," she looked east on Pine and seeing no car, went on. She had one foot over the first rail, when she saw a car approaching from the east. She says she only had time to withdraw her foot when the car struck her upon her left shoulder, throwing her to the sidewalk and inflicting the injuries complained of. In fixing the time she looked east with reference to the time she started to cross, she says "it was just a short time before I crossed;" "I know it was before but I cannot tell how long;" "I could not say any time; it was just a moment before I went over." Another answer was, "I can say it was better than a moment before."

The negligence complained of was failure to ring the bell, and she testified that no bell was rung. The testimony of other witnesses upon this point was given by two passengers on the car and the motorman. One passenger, Jones, testified: "I couldn't say that it did ring or that it didn't ring." The other passenger, Pickford, says the bell was rung three or four times between Summit (one block east) and Bellevue, and that the bell was rung within a car length of the crossing. The motorman testified that he rang the bell three or four times between Summit and Bellevue, and once or twice just before striking respondent. He also testified he did not see the respondent until she stepped out from the shade of a tree and stepped onto the track. This tree was shown to be set about twelve feet east from the crossing, and its foliage was from fifteen to eighteen feet in diameter. It

was also shown that there was an arc light hanging nearest to the northeast corner of the crossing; that between Summit and Bellevue the car was running on a down grade of 7.3 per cent, at eight or ten miles an hour, and that from the curb, where respondent started to cross the street, it was ten feet to the first rail, over which she placed her foot before she saw the car. The verdict was in favor of respondent, and the court denying appellant's motion for judgment notwithstanding the verdict, this appeal is taken, and this ruling and others involving the same point are assigned as error. It is apparent that the only question involved in the appeal is, Was respondent guilty of such contributory negligence as to preclude her recovery?

Respondent had lived on the southwest corner of this crossing for about eight months, and was familiar with the fact that a number of different car lines ran over these tracks, and that cars passed there frequently in both directions. She approached this crossing, then, well knowing the situation, and she was bound to use such a degree of care as an ordinary, prudent person having such knowledge of the situation would use under like circumstances. If she had done so, the conclusion is irresistible she would not have been injured. She says she looked a moment before she started across, but saw nothing and heard nothing; yet it is shown by an engineer familiar with the crossing that, taking the speed of the car at ten miles an hour, her speed at two and one-half miles an hour, and the distance from the place where she said she looked east to the track at ten feet, the car was then forty-two feet east of the crossing.

We cannot understand how one looking for a car can fail to see a lighted car with its headlight throwing on the track ahead of it, and only forty-two feet away. The physical facts of the situation are a unit in showing respondent could not have used ordinary care in attempting the crossing. If she looked she must have seen the car, or else she gave such an indifferent and casual glance as was of no value to her in

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determining whether or not a car was approaching. In either event, she was not using ordinary care. The car was there with its lights burning, and such a look as would be given by an ordinary, prudent person would have located it. Pedestrians in crossing the tracks of a street railway in the daytime or in the nighttime, knowing as respondent knew that the crossing was one where cars frequently passed, must use their senses to apprise them of danger, if any; they cannot heedlessly and carelessly cross the track, and throw the entire burden of their safety upon the motorman of any approaching car. The rights of the pedestrian and that of the street railway are equal. Their duties are reciprocal. Neither has the exclusive right of way; each must have due regard to the rights of the other.

It is urged by respondent that, if it should appear that she attempted the crossing without looking and without listening, such failure is not contributory negligence in law; citing *Roberts v. Spokane St. R. Co.*, 23 Wash. 325, 63 Pac. 506, 54 L. R. A. 184, and other cases from this court in which it is held that failure to look and listen before crossing the tracks of an electric railway in a public street where the cars have not the exclusive right of way, is not negligence *per se*. Such is undoubtedly the rule here, but such a rule does not mean that one can heedlessly and carelessly cross the track without using his senses for his protection; nor does it mean that those who have eyes to see but see not and ears to hear but hear not, are exercising due care. In determining the question of contributory negligence, due care or ordinary prudence is the only known test. What would be due care under certain circumstances would not be due care under other and different circumstances; and in determining this question this court has refused to predicate its answer alone upon the fact that it did not appear that the person about to cross the track looked or listened, and say such failure of itself alone constitutes negligence in law. Other facts existing and present and affecting the situation

must be given their due weight in determining the question of contributory negligence. In other words, it is not alone, Did the pedestrian look and listen? and upon answering that question in the negative, say it is negligence *per se*, and there can be no recovery. But the test is, did the pedestrian, under all the circumstances, use such a degree of care, caution, and prudence as an ordinary, prudent and careful pedestrian would use under like circumstances; and in answering such test, this court has in a number of cases held that the failure to look and listen was a fact to be considered in determining whether or no there was contributory negligence as a matter of law. *Skinner v. Tacoma R. & Power Co.*, 46 Wash. 122, 89 Pac. 488; *Mey v. Seattle Elec. Co.*, 47 Wash. 497, 92 Pac. 283; *Dimuria v. Seattle Transfer Co.*, 50 Wash. 633, 97 Pac. 657. The same rule has been applied to the drivers of wagons in crossing the track. *Christensen v. Union Trunk Line*, 6 Wash. 75, 32 Pac. 1018; *Criss v. Seattle Elec. Co.*, 38 Wash. 320, 80 Pac. 525; *Coats v. Seattle Elec. Co.*, 39 Wash. 386, 81 Pac. 830; *Davis v. Coeur d'Alene & Spokane R. Co.*, 47 Wash. 301, 91 Pac. 839; *Helber v. Spokane St. R. Co.*, 22 Wash. 319, 61 Pac. 40. The *Roberts* case cites as authority for the rule therein announced: *Robbins v. Springfield St. R. Co.*, 165 Mass. 30, 42 N. E. 334, and *Shea v. St. Paul City R. Co.*, 50 Minn. 395, 52 N. W. 902. An examination of the Massachusetts and Minnesota cases will show that the announcement of such a rule was never intended to be construed as a holding that failure to look and listen was not a circumstance to be considered in determining the question of contributory negligence as a matter of law. We refer to a number of such cases subsequent to the *Robbins* case.

In *Hall v. West End St. R. Co.*, 168 Mass. 461, 47 N. E. 124, the holding is, to cross a street railway track "in such a state of inattention as to know nothing of the approach of a car until struck shows want of ordinary care." In *Kelley v. Wakefield & S. St. R. Co.*, 175 Mass. 331, 56 N. E. 285, it is

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said, there is no absolute rule of law requiring a traveler to look and listen, but if it appears that the plaintiff's conduct was negligent and that such negligence contributed to the injury, it is the duty of the court to direct a verdict for defendant. In *Hurley v. West End St. R. Co.*, 180 Mass. 370, 62 N. E. 263, the ruling is, where plaintiff in the daytime drove across the tracks of a street railway on which he knew electric cars were running, without looking, he was not in the exercise of due care. In *Itzkowitz v. Boston Elevated R. Co.*, 186 Mass. 142, 71 N. E. 298, it is held that if, in the exercise of due care, plaintiff could not fail to see that he was close to the track and that a car might be expected to pass over it at any moment, he was not justified in stepping upon the track, when he could not fail to see the car, without shutting his eyes, and when it would seem as if he should have heard it. In *Dunn v. Old Colony St. R. Co.*, 186 Mass. 316, 71 N. E. 557, the court says: "There was nothing to prevent the drivers seeing the car, had he looked at any time after he was fifty or sixty feet away," and a recovery was denied. In *Quinn v. Boston El. R. Co.*, 188 Mass. 473, 74 N. E. 687, it appeared that the plaintiff was stooping near the track and could have seen the car had he looked, and could have heard it had he listened. His failure so to look and listen was held to be contributory negligence. In *Blackwell v. Old Colony St. R. Co.*, 193 Mass. 222, 79 N. E. 335, the opinion reads, "from the time he left the sidewalk until he was struck, it is not shown that he had either looked or listened for a car . . . he must have known of the near presence of the moving car had he taken any precaution whatever to ascertain," and such failure is held to be contributory negligence. In *Saltman v. Boston Elevated R. Co.*, 187 Mass. 243, 72 N. E. 950, the plaintiff was held guilty of contributory negligence in driving upon the track when he could not use his sight for his protection nor depend upon his sense of hearing. See, also, *Donovan v. Lynn & B. R. Co.*, 185 Mass. 533, 70 N. E. 1029, and *Fitzgerald v. Boston Elevated R. Co.*, 194

Mass. 242, 80 N. E. 224. The Minnesota cases subsequent to *Shea v. St. Paul City R. Co.*, *supra*, announce a like rule. In *Terien v. St. Paul City R. Co.*, 70 Minn. 532, 73 N. W. 412, the syllabus by the court reads:

“Whether a pedestrian is guilty of contributory negligence in failing to look and listen before attempting to cross the track of a street railway is, as a general rule, a question of fact for the jury, to be determined from all the circumstances of the particular case; but the circumstances may be such, and the evidence as to those circumstances so conclusive, that the court should say, as a question of law, that he was guilty of contributory negligence in failing to look and listen;” citing, *Hickey v. St. Paul City R. Co.*, 60 Minn. 119, 61 N. W. 893, where it was held, as a question of law, that the plaintiff therein was guilty of contributory negligence in failing to look and listen before crossing the street railway track.

In *Russell v. Minneapolis St. R. Co.*, 83 Minn. 304, 86 N. W. 346, the court thus states the rule:

“It is not, as a matter of law, negligence for a pedestrian to cross a street railway track (at least, within the populous part of the city) without looking and listening for an approaching car. Whether the failure to look and listen be an act of negligence must be determined from all the circumstances of each particular case, guided by the rule of ordinary care and prudence. If a person by the exercise of such care could have discovered an approaching car and avoided the accident and he failed to do so, he cannot recover. So the question in every case is one of ordinary care. Failure to look and listen might be conclusive, or at least very strong, evidence of negligence in one case, and in another of no particular controlling force at all.”

Referring to the facts in the case before it, the court continues:

“A glance of the eye to the left would have informed her of the approach of the car, but she says she neither heard nor saw it. Clearly, from her undisputed evidence, reasonable minds can arrive at but one conclusion, and that to the

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effect that her own indifferent and careless conduct was the cause of the injuries she received."

Such language might well be written upon a review of the facts in the case before us.

The latest kindred expression from this court may be found in *Keefe v. Seattle Elec. Co.*, 55 Wash. 448, 104 Pac. 774, wherein it is said:

"The facts speak the law in each case, and it does not follow from what we have said that a person has a right to go blindly upon a track when a car is so near that his attempt must necessarily result in a scramble for the right of way."

Cases might be multiplied holding a like rule. We have, however, confined our citations to those states following which this court first pronounced the rule in the *Roberts* case, and our purpose in doing so is to make clear that this rule in the *Roberts* case does not announce a rule of conduct that may be used as a measuring stick in all cases irrespective of the facts, which must alone determine its proper announcement.

In the present case, it conclusively appears to us that, if the respondent looked as she says she did, she must have seen the car then only forty-two feet away. If she did not look, under all the attendant circumstances, she was not using due and ordinary care. In either case she was guilty of contributory negligence, and she cannot recover.

The judgment is reversed and the cause remanded for dismissal.

RUDKIN, C. J., and CHADWICK, J., concur.

Gose, J. (concurring).—There is a photograph in the record, the accuracy of which is not disputed, which shows that the car which struck the respondent could be plainly seen from the place where the accident occurred, for a distance of about five hundred feet. There must of necessity be reciprocal duties upon the pedestrian and the street railway company. The track itself is a danger signal, and the pedestrian cannot be absolved from using the care which ordinary pru-

dence demands. Under the circumstances admittedly present in this case, the act of the respondent in starting to cross the track was gross negligence. The verdict of a jury will not be permitted to control physical facts. In concurring I assume that there was competent evidence from which the jury might find that the motorman did not ring the bell after leaving Summit avenue, but it does not follow that the respondent could step in front of a well-lighted, moving car so near her that she could not withdraw her foot in time to avoid being struck by it, without being guilty of such negligence as to preclude a recovery. If she can recover in this case, a right of recovery could not be denied her if she had been a second later and had been injured in colliding with the body of the car.

FULLERTON, J. (dissenting).—Whether the street car bell was rung by the motorman just prior to the time the car struck the respondent, and whether the respondent was guilty of contributory negligence, were disputed questions of fact, on which, in my opinion, there was evidence sufficient to support a verdict for either party. The questions, therefore, were for the jury, and this court should abide by the jury's determination thereof.

[No. 8465. *En Banc*. December 11, 1909.]

THE STATE OF WASHINGTON, *on the Relation of Tumwater
Power & Water Company, Plaintiff*, v. THE SUPERIOR
COURT FOR THURSTON COUNTY, *Respondent*.¹

CERTIORARI—APPLICATION—TIME. As the statute fixes no time within which to apply for a writ of certiorari, by analogy, application for a writ must be made within the time for taking an appeal.

EMINENT DOMAIN—PROCEEDINGS—REVIEW. Appeal or writ of certiorari in condemnation proceedings must be taken within thirty days, and the pendency of an appeal is no excuse for failure to apply for a writ of certiorari.

Application for a writ of certiorari to review an order of the superior court for Thurston county, Linn, J., entered May 4, 1908, upon sustaining a demurrer to an answer in intervention, in condemnation proceedings. Denied.

G. C. Israel, Martin L. Pipes, George H. Funk, and Frank C. Owings, for relator.

A. J. Falknor and Troy & Sturdevant, for respondent.

MOUNT, J.—This is an application for a writ of review. It appears therefrom that the Olympia Light & Power Company brought an action against the Olympia Brewing Company, to condemn certain property which was alleged to be necessary for a public use, the title of which property was alleged to be in the brewing company. The relator intervened in that action, and filed an answer therein. The Olympia Light & Power Company filed a demurrer to that answer, which demurrer was sustained by the trial court, and on May 4, 1908, the intervener was dismissed. Forty-three days later, viz., on June 16, 1908, the intervener in that action, the relator here, appealed from the order of dismissal to this court. That appeal was dismissed on October 28, 1909, for the reason that the order was not an appealable order.

¹Reported in 105 Pac. 815.

Olympia Light & Power Co. v. Tumwater Power & Water Co., 55 Wash. 392, 104 Pac. 778. Thereafter, on November 11, 1909, this application was filed here for a writ to review the order of May 4, 1908, dismissing the interveners from the condemnation case.

While the statute fixes no time within which the writ of review must be applied for, we have held by analogy that the writ must be applied for within the time fixed for taking an appeal. *State ex rel. Lowary v. Superior Court*, 41 Wash. 450, 83 Pac. 726; *State ex rel. Alexander v. Superior Court*, 42 Wash. 684, 85 Pac. 673. The time within which an appeal may be taken from a final order in condemnation cases is fixed by law at within thirty days after the entry of the judgment. Bal. Code, § 5645. The time for prosecuting the writ of review had expired when the relator sought to appeal to this court from the order now sought to be reviewed. It was too late at that time to prosecute the writ of review. No excuse is offered why the writ was not applied for within the thirty days after the order was entered, and none appears here now. The fact that an appeal was pending in this court from June 16, 1908, until October 28, 1909, is of course no excuse for not prosecuting the writ of review prior to June 16, 1908.

The application must be denied for the reason that it was not seasonably made.

DUNBAR, PARKER, CROW, MORRIS, and GOSE, JJ., concur.

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Statement of Case.

[No. 8319. Department Two. December 11, 1909.]

THE STATE OF WASHINGTON, *Respondent*, v. CHARLES J.
NILSON, *Appellant*.¹

EMBEZZLEMENT—BY AGENT—EVIDENCE—ADMISSIBILITY. In a prosecution for the embezzlement of money sent to the defendant to pay taxes on the land of the prosecuting witness, the land having been left in charge of the defendant, it is relevant and pertinent for the state to show that the defendant witnessed a deed purporting to convey the land and knew of the change in title, and had not used the money for the purpose for which it was sent.

SAME—EVIDENCE—SUFFICIENCY. The evidence is sufficient to sustain a conviction for embezzlement, where it appears that defendant received a certain sum of money for the specific purpose of paying taxes on land, and failed to use it for that purpose and deceived his principal in the matter.

SAME—EVIDENCE—ADMISSIBILITY—CRIMINAL LAW—BEST AND SECONDARY EVIDENCE. In a prosecution for the embezzlement of money sent to pay taxes, certified copies of tax receipts made from the originals in the treasurer's office, showing the payment of the taxes by others, are competent to show *prima facie* that defendant did not pay the taxes, where the treasurer testified that he paid no taxes; and the same are not subject to the objection that the defendant was not confronted with the witness against him.

SAME—EVIDENCE—ADMISSIBILITY—INSTRUCTIONS. In a prosecution for embezzlement of money sent to pay taxes on land left in charge of the defendant, evidence in regard to a deed of the land to another, and defendant's knowledge thereof, is properly submitted to the consideration of the jury in so far as it had a tendency to show the guilty knowledge of the defendant, who deceived the prosecuting witness in receiving the money for a specific purpose.

Appeal from a judgment of the superior court for King county, Gilliam, J., entered June 7, 1909, upon a trial and conviction of the crime of larceny by embezzlement. Affirmed.

E. F. Kienstra, for appellant.

George F. Vanderveer and *F. H. Holzheimer*, for respondent.

¹Reported in 105 Pac. 829.

MOUNT, J.—Appellant was convicted of the crime of larceny by embezzlement. He appeals from the judgment and sentence pronounced thereon, and argues that the court erred, (1) in permitting the prosecuting attorney, in his opening argument to the jury, to say that, “We will show you further in this case that Mr. Johnson was led to believe in all these years that he owned this property—which he does own—and we will show you by the testimony that in 1902, in reference to this particular land in Lewis county, Charles J. Nilson sold this land to John Erickson of this city for a considerable sum of money”; (2) in denying defendant’s motion for a dismissal of the case and the discharge of the defendant; (3) in admitting in evidence transfers of the Lewis county property as materially bearing upon the guilt of the defendant as charged and as a part of the *res gestae*; (4) in admitting in evidence certain certified tax receipts; and (5) after instructing the jury to disregard all the evidence of transfers of the land, in making an exception as follows: “Except in so far as such evidence may or may not have the tendency to show guilty knowledge on the part of the defendant in this case.”

The evidence shows that the prosecuting witness, Albert Johnson, about the year 1897, owned a quarter section of land in Lewis county. He went to Alaska about that time, and authorized the appellant to look after the land for him. Each year he would send to the appellant money with which to pay the taxes on the land. In the year 1908, he sent the appellant the sum of \$30.40 with which to pay the taxes then due. Later, Johnson discovered that appellant had not paid the taxes, and that the record title of the land had not stood in his name since the year 1902; that appellant had knowledge of that fact, and had not used the money for the purpose for which it was sent to him.

The prosecuting attorney, in his opening statement to the jury, used the language quoted above in stating the first point, and appellant argues that the facts there stated were

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irrelevant and incompetent and tended to prejudice the jury. The facts stated were clearly relevant and competent. The money which appellant was charged with embezzling was sent to him by the prosecuting witness for the purpose of paying taxes on this particular land. The prosecuting witness believed he owned the land. He had no notice that any change in the title had taken place. Appellant was a witness to the deed which purported to have been executed by the prosecuting witness, and knew the facts in relation to the change of record title. The evidence was relevant and competent to show such knowledge, and also to show the circumstances under which the money was sent to the appellant. There was, therefore, no error in permitting the statement, or in receiving evidence in support thereof.

There was no error in denying the appellant's motion for dismissal. The evidence clearly shows that the appellant received the money, \$30.40, for a specific purpose, and that it was not used for that purpose; also that he deceived the prosecuting witness in regard thereto.

It is claimed that the court erred in receiving in evidence certain certified tax receipts. These receipts show that certain taxes had been paid by persons other than the appellant. It is claimed that the persons paying these taxes should have been produced as witnesses, and that the copies of the receipts are not made from the original thereof. The county treasurer was called as a witness and testified that no taxes had been paid by the appellant. The copies of the receipts show that they were made from the originals in the treasurer's office. They were clearly competent to show *prima facie* who paid the taxes, and are not subject to the objection that the appellant was not confronted with the witnesses against him.

The court gave the following instruction:

"I instruct you to disregard all evidence in the case in regard to the transfers between the defendant and persons other than the prosecuting witness, Albert Johnson, and dis-

regard all the evidence concerning the sale of said land from the prosecuting witness to John Erickson, excepting so far as such evidence may or may not have a tendency to show guilty knowledge on the part of the defendant in this case."

Appellant contends that the exception was erroneous, and nullifies the former part of the instruction. This contention is based upon the theory that all such evidence was inadmissible. But we have seen above that the evidence was admissible, not for the purpose of proving an independent crime, but for the purpose of showing that the prosecuting witness was not liable for taxes if the land was regularly sold; and if the sale was irregular by reason of fraud or deceit, the appellant knew this fact, and in either event deceived the prosecuting witness and thereby received the money for a particular purpose by reason of such deceit.

We find no error in the record, and the judgment must therefore be affirmed.

RUDKIN, C. J., DUNBAR, and CROW, JJ., concur.

[No. 8106. Department One. December 11, 1909.]

RASMUS KONNERUP, *Respondent*, v. Z. T. ALLEN *et al.*,
Appellants.¹

APPEAL—DISMISSAL—CESSATION OF CONTROVERSY—ELECTION OF REMEDIES—SALES—BREACH OF WARRANTY. The vendees of shingle bolts, having elected to repudiate the contract and hold the bolts subject to the vendor's order, for alleged breach of warranty, cannot, after adverse judgment against them for the price and appeal to the supreme court, cut up the bolts into shingles and preserve their rights in the action; and the appeal will be dismissed because the subject-matter of the action has ceased to exist.

Appeal from a judgment of the superior court for Snohomish county, Black, J., entered November 7, 1908, upon findings in favor of the plaintiff, after a trial on the merits

¹Reported in 105 Pac. 639.

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before the court without a jury, in an action on contract. Appeal dismissed.

S. J. White and E. C. Dailey, for appellants.

Thos. A. Stiger and Jos. Coleman, for respondent.

CHADWICK, J.—This action was originally brought to recover the value of certain shingle bolts sold by respondent to appellants. The case went to trial upon the complaint and answer, in which appellants set up the statute of frauds, the failure of respondent to fulfill his contract in that he had substituted bolts of an inferior quality, that there had been no acceptance, and that the bolts were held subject to the order of respondent. It was further alleged that appellants had been damaged in the sum of \$90 on account of moneys paid for towing the bolts from Triangle Bay to appellants' mill at Edmonds, two dollars a day for the use of the cribs, and \$160 lost profits. For the towage and use of the cribs they claimed a lien on the bolts. A trial resulted in a judgment for respondent.

The trial court found that the bolts were in fact merchantable, and had been inspected and received by appellants. Pending this appeal, as it now appears, appellants have cut the bolts into shingles, and we are confronted by a motion to dismiss the appeal and for an affirmance of the judgment, because the subject-matter of the litigation has ceased to exist. In opposition to this showing, one of the appellants makes affidavit:

“That at the time of the rendition of the judgment in the trial court in said action, the shingle bolts mentioned and described in the affidavit in support of said motion of respondent, were lying and being on the cribs of appellants; that appellants had theretofore demanded of respondent that he remove said shingle bolts from said crib, and respondent refused and failed to do so; that said cribs cost appellants about \$300, and were fast being destroyed by the action of teredos; that appellants were greatly in need of the use of said cribs for use in the business for which they were built; that appel-

lants did not wish to wantonly destroy the property of respondent, and there was nothing else for appellants to do but to cut said shingle bolts into shingles, and in doing so, has kept an accurate account of the number of shingles cut therefrom, which number was about 60 per cent of number usually cut from reasonably good bolts; that appellants did not cut such shingle bolts as an acceptance of the same under a contract of any kind or description; but simply to get the use of said cribs, and at the same time to prevent the wanton destruction of said shingle bolts by throwing them into the waters of Puget Sound; that appellants have never accepted said shingle bolts as a compliance with any contract, or the fulfillment of a contract, nor have they paid the judgment appealed from or settled the controversy."

It is clear to us that the response of appellant not only does not meet the showing made by respondent, but makes it imperative that we make an end of this litigation. If the affidavit is taken at its full worth, it meets no issue which we are at liberty to decide or settle in this case. When sued appellants might have accepted the bolts, and recouped against the purchase price such damages as they had sustained by reason of the breach of warranty as to quality; or they might have repudiated the transaction entirely. Benjamin, Sales (7th ed.), 894 *et seq.* They chose the latter remedy. Manifestly it is not within the power of this court to try a new issue, nor is it in the power of the appellants to switch their case on appeal. We cannot assume the functions of a trial court and try an issue which, had it been tendered in the court below, would have required testimony to sustain it, and if supported carried a different measure of damage. Having elected to hold the shingle bolts subject to the order of respondent, appellants could not thereafter cut them into shingles and preserve their rights in the present case. They cannot by thus making return of a loss of forty per cent in cutting overcome the finding of the lower court that the bolts were all merchantable. Appellants had alleged the bolts to be the property of respondents. They cannot now

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be heard to maintain a defense which can be based only upon title in themselves.

We are bound by the record and the transcript, and can only sustain or reverse the case made therein. The affidavit of appellant, notwithstanding their disclaimer showing that the defense heretofore relied upon has been forsaken, we must hold that this case falls within that line of cases establishing the rule that a court will not decide a case where the subject-matter of the appeal has ceased to exist. *Mackay v. Dever*, 49 Wash. 439, 95 Pac. 860; *Kelso v. American Inv. & Imp. Co.*, 48 Wash. 5, 92 Pac. 673.

The appeal is dismissed.

RUDKIN, C. J., FULLERTON, MORRIS, and GOSE, JJ., concur.

[No. 8260. Department One. December 11, 1909.]

THE STATE OF WASHINGTON, *Respondent*, v. RICHARD QUINN,
Appellant.¹

CONSTITUTIONAL LAW—RIGHTS OF ACCUSED—CRIMINAL LAW—NOTICE OF NATURE OF OFFENSE—WAIVER. Constitution, art. 1, § 22, providing that the accused shall have the right to demand a copy of the charge against him, and Bal. Code, § 6879, providing that such copy shall be served, merely grant a privilege that is waived by plea and entering upon the trial without request for the copy, service of which is not jurisdictional.

CRIMINAL LAW—PLEA OF NOT GUILTY—RECORD. A plea reciting in the first division that the accused "hereby enters his plea of not guilty" and adding pleas of mental irresponsibility and insanity, shows an affirmative plea of not guilty.

SAME—RECORD OF PLEA—PRESUMPTIONS. Where the accused, after overruling a demurrer to the information, announced himself ready for trial, it will be presumed that a plea had been entered even if not shown by the record.

SAME—PLEA OF INSANITY—WITHDRAWAL—EFFECT. Laws 1907, p. 33, § 2, provides for a separate plea of insanity, "in addition to the plea or pleas" required by law, so that withdrawal of the same does not affect the trial on the other pleas.

¹Reported in 105 Pac. 818.

HOMICIDE—DYING DECLARATIONS—OPINION EVIDENCE. A witness may give his opinion as to whether the deceased in making a dying declaration apparently believed that she could not live.

SAME—ADMISSIBILITY OF DECLARATION. A dying declaration is admissible where the deceased had received a mortal wound and had been informed by the attending physician that she must die, and the statement was drawn by the prosecuting attorney, read in her presence, and assented to and signed in the presence of witnesses.

CRIMINAL LAW—EVIDENCE—HEARSAY. The statement of an officer identifying a gun and cartridges handed to him by another, who told him they belonged to the defendant, is not inadmissible as hearsay, where the other person was called and testified that the defendant gave her the gun and cartridges shortly after the shooting and that she gave them to the officer.

CRIMINAL LAW—APPEAL—HARMLESS ERROR. Error in admitting hearsay evidence to identify a gun as that of the accused is harmless where the accused admitted his ownership while on the witness stand.

CRIMINAL LAW—TRIAL—INDORSEMENT OF WITNESS—DISCRETION. Allowing the indorsement of the names of witnesses upon the information after trial commenced is largely discretionary, and not ground for reversal in the absence of abuse of discretion.

HOMICIDE—EVIDENCE—THREATS—REMOTENESS. Evidence that the accused, two years before the homicide, had, in the presence of the deceased, threatened to shoot the deceased, is competent and not inadmissible as too remote.

HOMICIDE—INSTRUCTIONS—DEFINING DEGREES OF OFFENSE. An instruction defining the degrees of murder and manslaughter in the language of the statute is sufficient; since the statute bears no technical terms and is plain and unambiguous.

HOMICIDE—APPEAL—INSTRUCTIONS—HARMLESS ERROR. Where the defendant was guilty of murder either in the first or second degree, an unwarranted instruction on the subject of manslaughter is error favorable to the defendant of which he cannot complain.

CRIMINAL LAW—INSTRUCTIONS—REASONABLE DOUBT. An instruction, considered as a whole, correctly defines a reasonable doubt, where it is stated that the law did not require absolute certainty, or proof beyond the possibility of error, and required the jury to be convinced to a moral certainty and to have an abiding conviction of the defendant's guilt; although it contains the statement that the law of reasonable doubt is based upon the doctrine of reasonable probability, which might be objectionable if standing alone.

INDICTMENT AND INFORMATION—SUFFICIENCY OF STATEMENT OF FACTS. An information for homicide sufficiently describes the man-

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ner of killing, under Bal. Code, § 6840, if it states the facts constituting the offense in ordinary language, so that it may be understood by a person of common understanding.

Appeal from a judgment of the superior court for Snohomish county, Black, J., entered January 30, 1909, upon a trial and conviction of murder in the first degree. Affirmed.

E. C. Dailey, for appellant.

Ralph C. Bell and *Robert Mulvihill*, for respondent.

CHADWICK, J.—The appellant was convicted of the crime of murder in the first degree, and brings this case here upon several assignments of error, the decision of which will require no particular statement of the facts. It is first urged that appellant was not served with a copy of the information, thus being denied the protection of the Bill of Rights, in that he has not been informed of the nature and cause of the accusation made against him. Section 22, art. 1 of the state constitution provides that every person accused of crime shall have the right “to demand the nature and cause of the accusation against him, to have a copy thereof,” etc. It is provided (Pierce’s Code, § 2131; Bal. Code, § 6879), that “as soon as may be after the filing of the information for a capital crime, the party charged shall be served with a copy thereof,” etc. So far as the constitution is concerned, it is enough to say that it goes no further than to give the right to demand a copy, a privilege that was not exercised in this case; and under an almost unbroken line of authority it is held that the statute is not jurisdictional. No greater weight is attached to it than to the constitution itself. Each grants a privilege which may be waived. In this case defendant was regularly arraigned, asked for time to plead, was granted five days, within which he demurred to the information; whereupon he entered a plea as follows:

“Comes now the defendant and for answer to the charge set forth in the information.

"(1) Hereby enters his plea of not guilty.

"(2) That at the time charged in the information, and for a long time prior thereto, this defendant was insane and mentally irresponsible.

"(3) That after said time charged in the information, and for a long time prior thereto, up to and including the present time, the said defendant is insane and mentally irresponsible."

His conduct was a waiver of formal service of a copy of the information. The purpose of the law is to give notice of the crime charged. At common law this was not given until arraignment, but neither the constitution nor the statute contemplates that a trial shall go for naught, if a defendant being informed of the crime charged voluntarily pleads without service of a written copy of the charge. The arraignment has performed the office of the law, and no request being made for a copy of the information, the statutory right must be deemed to be waived. The authorities upon this phase of the case are of one accord, and are collected in Vol. 10, Ency. Plead. & Prac., p. 471.

After appellant had announced himself ready for trial, and while a jury was being impaneled, appellant, through his attorney, withdrew his plea of insanity, the record reciting that, "Defendant in open court withdraws his plea of insanity." After the jury had been impaneled and sworn to try the case, and a witness had been called and sworn, the record recites: "Defendant now objects to proceeding with the trial because no plea has been entered since the withdrawal of the plea of insanity." This objection was overruled. In this the court did not err. The record showing that appellant demurred on the ground that the information did not state facts sufficient to constitute a crime; and, having announced himself ready for trial, this court will presume that a plea had been entered if the record did not show, as we think it does, an affirmative plea. *State v. Straub*, 16 Wash. 111, 47 Pac. 227.

If we understand the position of appellant, the point is made that the first plea was under the Laws of 1907, p. 33,

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chap. 80, §2, and that a withdrawal of the plea of insanity withdrew all other pleas. It will be noticed that the statute by its express terms makes allowance for the plea of insanity without affecting other pleas. It says of the plea of insanity that it may be entered "in addition to the plea or pleas required or permitted by other laws than this." The pleas then being severable, the withdrawal of the one left the other, and it was the duty of the court to proceed with the trial.

Testimony of a dying declaration was received by the court. In laying the premise for this the following question and answer were allowed by the court, over the objection of appellant:

"Question. State whether or not she apparently believed at that time that she could not live. Answer. Why, that is the understanding I had of it; that she believed that she was going to die."

Ordinarily expressions of bare opinion are not allowed, but in receiving declarations of this character, where death follows the wound, they are by that fact deemed to be supported and supplemented, and are given the character of positive evidence. Necessity has worked an exception to the general rule in this particular. The deceased had received a mortal wound and had been informed by the attending physician, who described her physical condition to the jury, that she must die. The statement was then drawn by the prosecuting attorney and read in her presence and assented to by her, and was signed by her in the presence of witnesses. It will thus be seen that, irrespective of the testimony complained of, there was ample foundation for the reception of the declaration. The ruling of the court in admitting the declaration was well within the rule of *State v. Power*, 24 Wash. 34, 63 Pac. 1112, and *State v. Mayo*, 42 Wash. 540, 85 Pac. 251.

The next error assigned is that a gun and some cartridges were admitted, upon the testimony of an officer who had them in possession and who was allowed to state, over objection, that another had told him that it was the gun and cartridges

belonging to the defendant. It is urged that this was hearsay. Standing alone it would clearly be so. But the state cannot state its case in one breath, nor prove it by one witness. The party who gave the gun and cartridges to the officer was put upon the stand and testified that defendant handed her the gun and cartridges shortly after the shooting, and that she had delivered them to the officer. The testimony was proper and tended to identify the exhibits. This assignment is without merit for another reason: The appellant, when upon the witness stand, identified the gun as his own.

It is also complained that the state was allowed to indorse the names of certain witnesses upon the information during the progress of the trial. The last expression of the court on this subject will be found in the case of *State v. Le Pitre*, 54 Wash. 166, 103 Pac. 27, wherein the previous decisions of this court were collected. In that case we undertook to answer the statement, made in that case as it is made in this, that the court has never squarely decided the question. Our conclusion, after a critical review of the authorities as well as our own decisions, was that it is settled in this state that "the indorsement of the names of witnesses upon an information is largely a matter of discretion with the court; and, in the absence of a showing of abuse or that some substantial injury has resulted to the accused, the order of the court will not be reversed."

A witness was also permitted to testify that, in September, 1906, appellant had threatened to shoot deceased, in his presence. The witness testified that appellant, after applying a vile epithet, said to her, "I will take a shot at you yet." It is contended that this testimony is incompetent, irrelevant, and immaterial, and is too remote. The first objections are without merit, and require no discussion. As to the last, this court has decided, in accord with the great weight of authority, that courts will not exclude threats because of remoteness. The time when a threat is made is immaterial. The lapse of time may be considered in connection with all other

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facts and circumstances to determine its weight as evidence, but its competency is a question of law for the court. *State v. Gates*, 28 Wash. 689, 69 Pac. 385. This subject was exhausted in that case, and we do not feel called upon to revive its discussion.

The court told the jury that:

"You are authorized, if, under the evidence, you are satisfied beyond a reasonable doubt that the defendant is guilty of murder in the first degree or murder in the second degree, or of manslaughter, to return a verdict in conformity with such evidence. . . . You are instructed that the laws of this state defining murder in the first and second degree, and manslaughter, so far as is applicable to this case, are as follows:

"Every person who shall purposely and of deliberate and premeditated malice kill another shall be deemed guilty of murder in the first degree. . . . Every person who shall purposely and maliciously, but without deliberation and premeditation, kill another shall be deemed guilty of murder in the second degree. . . . Every person who shall unlawfully kill any human being, without malice expressed or implied, either voluntarily upon a sudden heat or involuntarily but in the commission of some unlawful act, shall be deemed guilty of manslaughter."

It is contended that these instructions do not define the crime of manslaughter. We think that no more exact definition than a rehearsal of the statute was necessary. The statute bears no technical terms, and is plain and unambiguous and easily understood by a juror of ordinary intelligence. A further objection is made by counsel in his exceptions to the instructions, but not discussed in his brief, and that is that they do not instruct the law of the case. We agree with counsel in this particular. There is nothing in the record warranting an instruction for manslaughter. Appellant was guilty either of murder in the first degree or murder in the second degree, or he was not guilty. But he is not entitled to a reversal of the case on that account. The error of the court was favorable to him and he cannot complain. Of certain other instructions it is said:

"Our objections to these instructions are that they do not state the law of the case and are not applicable to the facts."

No specific objection is pointed out. It is sufficient to say that we have carefully examined the instructions complained of and find no error in them. They embrace the usual instructions of a general character given in this class of cases, and are couched in singularly apt language.

The giving of the following instruction is assigned as error:

"I have instructed you a great deal about reasonable doubt. As I said before, to some of the jurors who are now in this case, that the lawyers and judges of this country, for a great many years, have been endeavoring to find an exact and careful definition of it and, after all, they have only succeeded in saying this, that a reasonable doubt is a reasonable doubt. That is largely left to your good judgment. The law, however, is not based upon the doctrine of absolute certainty. If that were the law, it would be rarely, if ever, that a criminal could be convicted. The law does not require absolute certainty. It is based, rather, upon the doctrine of reasonable probability. And if, after considering all the evidence in the case, you can say that you are convinced to a moral certainty but not to an absolute certainty—if the evidence leaves in your mind an abiding conviction of the guilt of the defendant, then you are convinced beyond a reasonable doubt. You cannot go out and conjecture and guess and imagine possibilities. You must arrive at your conclusion from a fair consideration of all the testimony in the case, and the law does not require the several acts to be proven to you beyond the possibility of error, but it does require that the evidence leaves in your mind an abiding conviction and that you be convinced to a moral certainty of the guilt of the defendant before you can find him guilty."

That part of the instruction wherein the court says to the jury that the law of reasonable doubt is based upon the doctrine of reasonable probability may be technically correct, but is objectionable in law, and if standing alone would be deemed prejudicial. But, considering rather than commending the instruction as a whole, we think it fairly states the law of

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reasonable doubt, and that the jury could not have been misled. We find no exception to this instruction in the record, but on account of the gravity of the case we have considered this and other errors which would not otherwise be noticed.

It is also urged that the information does not describe the manner of the killing. The information is in the form approved in *Leonard v. Territory*, 2 Wash. Ter. 381, 7 Pac. 872, and many subsequent decisions of this court. See, *State v. Cronin*, 20 Wash. 512, 56 Pac. 26, where the intervening cases are collected. It has since been approved in *State v. Crawford*, 31 Wash. 260, 71 Pac. 1030. A person of common understanding cannot mistake its meaning. No more is required under the code. Bal. Code, § 6840.

Finally, it is urged that the verdict is contrary to law and the evidence. Our review so far shows that we have found no error of law prejudicial to the appellant. There was evidence to sustain all the material allegations contained in the information. The jury has resolved the fact against appellant, and it is not for us to say that it is not so.

The judgment of the trial court is affirmed.

RUDKIN, C. J., GOSE, MORRIS, and FULLERTON, JJ., concur.

[No. 8386. Department One. December 11, 1909.]

OLIE SHOLIN, *Respondent*, v. SKAMANIA BOOM COMPANY,
Appellant.¹

JURY—RIGHT TO JURY TRIAL—DEMAND. It is discretionary to submit the issues to trial by jury, although no demand for a jury was made before trial, as required by Laws 1903, page 50, to avoid a waiver of the right.

CONTINUANCE—ABSENCE OF EVIDENCE—DISCRETION—COSTS. It is discretionary to grant a continuance to enable a party to secure evidence, and error cannot be predicated thereon when the adverse party did not ask for costs as a condition precedent.

¹Reported in 105 Pac. 632.

HIGHWAYS—OBSTRUCTION—ACTION BY PRIVATE PERSON—SPECIAL DAMAGES. A mail carrier, whose route was over a bridge negligently destroyed by the defendant, sustains special damage for which he may maintain action, under the common law and under Bal. Code, §§ 5660, 5661, relating to the obstructions of highways, and authorizing actions therefor by any person injuriously affected, where, after destruction of the bridge, he sustained losses by reason of being compelled to deliver the mail by a more circuitous route.

Appeal from a judgment of the superior court for Skamania county, McCredie, J., entered November 6, 1908, upon the verdict of a jury rendered in favor of the plaintiff, in an action for damages for the obstruction of a highway. Affirmed.

George S. Shepherd and *George E. O'Bryon*, for appellant.
A. L. Miller and *R. M. Wright*, for respondent.

RUDKIN, C. J.—On the 19th day of May, 1906, the plaintiff entered into a contract with the United States, acting through the Postmaster General, to transport the mail from Collins, by way of Home Valley and Carson, to Stevenson and return, six times each week for the term of four years from the first day of July, 1906. At the time this contract was entered into and for some considerable time thereafter, the usual and only route of travel from Carson to Home Valley was along a public highway which crossed Wind river, a rapid mountain stream, on a public bridge constructed and maintained by Skamania county. The defendant is a corporation organized under the laws of this state, and at the times herein mentioned was engaged in driving logs and other timber products down Wind river. On the 19th day of October, 1906, the defendant so negligently conducted its logging operations that the bridge in question was carried away and destroyed. On the 17th day of November following, the defendant paid to Skamania county the sum of \$1,000, in full settlement for any and all loss or damage sustained by the county by reason of the destruction of the bridge. After the destruction of the bridge the plaintiff was compelled to carry the mail down the Colum-

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bia river by boat, and thence overland by a circuitous route to the several postoffices and places of delivery. The present action was instituted to recover the special damages resulting to him from the destruction of the bridge. The case came on for trial on the 6th day of February, 1908, but, after a portion of the testimony had been introduced, the court sustained an objection to oral testimony tending to show the terms and conditions of the mail contract between the plaintiff and the government. A continuance was thereupon granted, on the plaintiff's application, to enable him to procure a certified copy of the mail contract which was on file in the Post Office Department. A second trial was had on the 8th day of November, 1908, resulting in a judgment in favor of the plaintiff in the sum of \$100, from which this appeal is prosecuted.

When the case was called for trial the appellant objected to a trial by jury, for the reason that the respondent did not, at or before the time the case was called to be set for trial, serve upon the opposite party or his attorney, and file with the clerk of the court, a statement of himself or attorney that he elected to have the case tried by jury, as required by the act of March 6, 1903, Laws of 1903, p. 50. In answer to a similar complaint in *Knapp v. Order of Pendo*, 36 Wash. 601, 79 Pac. 209, we said:

"It is within the discretion of the trial court to permit a demand for a jury to be made after the case is called to be set for trial, or to submit the issues of fact in a case to a jury of its own motion, and no error can be predicated upon its ruling in that regard."

To the same effect, see *Fleming v. Wilson*, 39 Wash. 106, 80 Pac. 1104; *Hart v. Cascade Timber Co.*, 39 Wash. 279, 81 Pac. 738.

The granting of a continuance of the first trial is also assigned as error. This ruling was clearly within the discretion of the trial court. Had the court refused the continuance the respondent could have taken a voluntary nonsuit, and the appellant would have gained nothing by such a course

except a recovery of its costs. Perhaps the court would have imposed this burden upon the respondent as a condition to the granting of a continuance, had the appellant requested it, but no such request was made.

The remaining assignments of error go to the sufficiency of the complaint and to the sufficiency of the evidence to make out a cause of action. Upon this question there is a conflict of authority, both within and without this state. All the authorities agree that a private action for the obstruction of a public highway is only maintainable by those who suffer some particular loss or damage therefrom beyond that suffered by the general public. Interference with a common right does not, of itself, afford a cause of action to the individual, but special or particular damages consequent upon such interference does. There is little difficulty in stating the general rule, but when we look to the decided cases to ascertain what constitutes particular or special damages within the meaning of the rule, we find a hopeless conflict. Any attempt to review the authorities, or to extract from them a rule which might be said to be sustained by the weight of authority, would be both futile and fruitless. The extreme view on the one side is perhaps taken in Massachusetts, where it has been held in numerous cases that individuals suffering very considerable loss and damage from the obstruction of navigable streams and public highways have no right of action, because their loss differs in degree and not in kind from that sustained by the general public. Many of the cases from that state may be found cited in *Jones v. St. Paul M. & M. R. Co.*, 16 Wash. 25, 47 Pac. 226, upon which the appellant chiefly relies. The extreme view on the other side is perhaps taken in Maine where it has been held that a person stopped by an obstruction in a public highway while returning home with a loaded team, and compelled to return by a more circuitous route, suffered special damages and had a right of action against the wrongdoer. *Brown v. Watson*, 47 Me. 161, 74 Am. Dec. 482. A review of many cases bearing upon this general question

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will be found in *Viebahn v. Crow Wing County Com'rs*, 96 Minn. 276, 104 N. W. 1089, reported in 3 L. R. A. (N. S.) 1126, and in the note to that case. The rule is thus stated in *Elliott on Roads and Streets* (2d ed.), §669:

"As a general rule, no person can maintain an action for damages from a common nuisance where the injury and damages are common to all. But if a person sustains a special damage, peculiar to himself, from the obstruction of a highway, whether it be to his person or his property, he may maintain an action therefor. Thus, obstructing and cutting off the access to a person's place of business is a special injury, for which he may recover damages in an action at law; and ejectment or trespass will lie against one who wrongfully places an obstruction of a permanent character upon that part of a highway in which the complainant owns the fee. So, if the complainant, by reason of an obstruction in a highway, is compelled to turn back or go by a more circuitous route, whereby he is specially damaged by being rendered unable to perform a contract, he may maintain an action therefor; and the same is true if, by reason of such obstruction, he sustains peculiar damage in the labor of himself and his servants to remove the obstruction. So, where an obstruction wrongfully placed by a third person in a highway causes travelers to pass around it over the adjoining land, whereby the crops of the landowner are injured, the latter may have his action against the person creating the obstruction. But a mere delay caused by an obstruction, unaccompanied by special injury, does not, as a rule, give any right to an action for special damages."

In *Wakeman v. Wilbur*, 147 N. Y. 657, 42 N. E. 341, the court said:

"The referee found from evidence entirely sufficient that the plaintiff was obliged to use the road in the winter for the purpose of drawing logs, but on account of the obstruction he was for several days compelled to take another and much longer route, to his pecuniary damage; that at other times he was obliged to clear the road from the drifts of snow that had accumulated in consequence of the fence, which required time and labor, and in some other respects he was put to expense in the use of the road for his lawful business, by reason of the

defendant's acts. . . . These findings bring the case within the principle which permits a private person to maintain an action to abate a public nuisance, and to recover the damages which he sustained and which were special and peculiar to himself, growing out of necessity on his part to use the road at the time of the obstruction more frequently, perhaps, than his neighbors. The obstruction was, no doubt, an offense against the public, but it was none the less, in a special and peculiar sense, an injury to the plaintiff."

In *Knowles v. Pennsylvania R. Co.*, 175 Pa. St. 623, 34 Atl. 974, 52 Am. St. 860, it was held that one who contracted to haul dirt at a specified price per load might recover damages from a railroad corporation for thereafter erecting and maintaining a fence across a highway which was the natural route from the place where the dirt was taken to the place of delivery, and over which several loads could have been hauled in the time required to haul one load by the circuitous route which the contractor was compelled to take because of the obstruction. See, also, *Milarkey v. Foster*, 6 Ore. 378, 25 Am. Rep. 531.

In *Jones v. St. Paul M. & M. R. Co.*, *supra*, this court followed the extreme views of the supreme judicial court of Massachusetts, and held that the owner of a steamboat accustomed to navigate a river could not recover damages caused by an obstruction to navigation, compelling him to tie up his boat for several days. This case is in conflict with many decisions of this court and is opposed to the weight of authority. *Viebahn v. Crow Wing County Com'rs*, *supra*, and cases there cited.

Thus in *Carl v. West Aberdeen Land & Imp. Co.*, 13 Wash. 616, 43 Pac. 890, it was held that persons engaged in driving logs might maintain an action to abate a dam which constituted an obstruction to navigation. To the same effect are *Sultan Water & Power Co. v. Weyerhaeuser Timber Co.*, 31 Wash. 558, 72 Pac. 114; *Monroe Mill Co. v. Menzel*, 35 Wash. 487, 77 Pac. 813, 102 Am. St. 905, 70 L. R. A. 272; *Dawson v. McMillan*, 34 Wash. 269, 75 Pac. 807. The rule

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has been extended to actions to enjoin or abate other nuisances. *Ingersoll v. Rousseau*, 31 Wash. 92, 76 Pac. 513; *Wilcox v. Henry*, 35 Wash. 591, 77 Pac. 1055.

In *Creech v. Humptulips Boom & River Imp. Co.*, 37 Wash. 172, 79 Pac. 633, it was held that individuals injured by the obstruction of a navigable slough might recover special damages caused by the obstruction. In *Smith v. Mitchell*, 21 Wash. 536, 58 Pac. 667, 75 Am. St. 858, it was held that where the only means of ingress and egress to and from the lands of a private person, in order to reach a market for the products of his farm and nursery, is over a public highway, the obstruction of such highway is of such special injury as will sustain an action to enjoin the nuisance under Bal. Code, § 3093, which provides that, "A private person may maintain a civil action for a public nuisance, if it is specially injurious to himself, but not otherwise." Bal. Code, § 5660, provides that, "The obstruction of any highway . . . is a nuisance, and the subject of an action for damages and other and further relief." The following section, 5661, provides that "Such action may be brought by any person whose property is injuriously affected or whose personal enjoyment is lessened by the nuisance." Under these sections, and under what we believe to be the weight of authority, the present action is maintainable. A rule that prohibits such actions may tend to discourage litigation but does not tend to promote justice.

The judgment of the court below is affirmed.

FULLERTON, CHADWICK, MORRIS, and GOSE, JJ., concur.

[No. 8191. Department Two. December 13, 1909.]

SARAH J. D. CONNER, *Respondent*, v. SEATTLE, RENTON &
SOUTHERN RAILWAY COMPANY, *Appellant*.¹

EVIDENCE—SELF-SERVING DECLARATION—CONDUCTOR'S ACCIDENT REPORT—CARRIERS. A conductor's written report of accident to a passenger, made at the time and soon thereafter given to the defendant, in compliance with its rules and custom, is inadmissible as it is a self-serving statement made in its own interest, and for the purpose of facilitating its defense.

APPEAL — REVIEW — EVIDENCE — TRIAL — MOTION FOR NONSUIT—WAIVER. A motion for a nonsuit is waived by proceeding with the trial and introducing evidence, after which the sufficiency of the evidence is to be determined in the light of all the evidence in the case.

CARRIERS—INJURY TO PASSENGER—PASSES—QUESTION FOR JURY. In an action by a passenger for personal injuries, where there was a conflict in the evidence as to whether she was riding on a pass waiving liability, and she testified positively that she was not and had paid her fare, the question is for the jury.

Appeal from a judgment of the superior court for King county, Tallman, J., entered January 4, 1909, upon the verdict of a jury rendered in favor of the plaintiff, in an action for personal injuries. Affirmed.

Morris B. Sachs, for appellant.

Morris, Southard & Shipley, for respondent.

PARKER, J.—This action was brought to recover damages for personal injuries, alleged to have been sustained by the plaintiff while a passenger upon one of defendant's cars.

Plaintiff alleged in substance, in her complaint, that on November 25, 1905, she boarded one of defendant's cars, as a passenger for hire, for the purpose of taking passage thereon; that defendant carelessly and negligently maintained and operated said cars with a trapdoor in the floor thereof, near

¹Reported in 105 Pac. 634.

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the entrance, over which plaintiff was required to pass in order to reach a seat; that said trapdoor was negligently maintained at a sufficient elevation above the floor of the car so as to be a menace and danger to persons passing over same, all of which was unknown to her; that in passing from the rear entrance of the car to a seat therein, without any fault on her part, she stumbled upon said raised trapdoor, and by the sudden motion caused by the negligent starting of the car and by her stumbling upon said door she was violently thrown from her feet and precipitated upon the floor of the car with great force and violence, and was severely injured thereby; that if defendant had used reasonable diligence and care in the construction, maintenance and operation of the car, the accident and injury to her would not have occurred; that she was permanently crippled and deformed by reason of said injuries, describing them, and has suffered and will suffer great physical and mental pain, all to her damage in the sum of \$20,000, for which she prays judgment against defendant.

Defendant by its answer denied the allegations of negligence charged against it in plaintiff's complaint, and as an affirmative defense alleged, in substance, that if plaintiff was at the time and place alleged by her a passenger upon its car, she was a gratuitous passenger traveling as such upon a pass issued at her request, without any consideration whatsoever to defendant, which was issued to and accepted by her under the conditions indorsed thereon as follows:

"In consideration of this free pass I hereby agree to assume and do assume all risk of accidents, damages and loss of property sustained by me, and I expressly agree with the Seattle, Renton & Southern Railway Company that it shall not be liable under any circumstances whether by reason of negligence of its agents or otherwise for any injury or loss to me as aforesaid."

Plaintiff replied denying the allegations of this affirmative defense. A trial upon these issues before the court and a jury

resulted in a verdict for \$2,400 in plaintiff's favor. Thereupon defendant moved for a new trial, which the court denied and rendered judgment upon the verdict, from which this appeal is prosecuted.

It is first contended by learned counsel for appellant that the trial court erred in refusing to admit in evidence, offered in appellant's behalf, the report of the accident made in writing by the conductor of the car immediately following the accident, and very soon thereafter given to the defendant, in compliance with its rules. The theory upon which counsel sought to introduce this evidence is, using his own language:

"The report was admissible as being original entries made in the regular and due course of the business of the company and made contemporaneously with the transactions recorded."

For the sake of argument, we may admit that the report was made in due course and in compliance with a rule and custom universally followed. Yet we are quite unable to see how the statements made in such report can escape the objection of being self-serving, in so far as they were favorable to appellant's contentions (and of course it was because they were so favorable, that they were offered to support its contentions), being made by appellant's agent and in its interest concerning facts which the agent at the time of taking them knew would most likely become matters of dispute and drawn into litigation. Indeed, it is evident that the very making of the report upon the facts surrounding the accident was prompted by the possibility of the respondent claiming damages and suing the appellant therefor. Counsel cite the case of *Callihan v. Washington Water Power Co.*, 27 Wash. 154, 67 Pac. 697, 91 Am. St. 829, 56 L. R. A. 772, in support of his contention. In that case the question of fact was involved as to whether or not a woman was a passenger upon a certain car during a certain trip, she having testified that she had paid her fare by a transfer slip. The conductor's trip report, identified by him and offered in connection with his oral testimony, which had been made in usual course of business

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showing that all fares paid on that trip were cash fares, was admitted in evidence over objections, which was assigned as error. We think a careful reading of that decision will show that the court did not regard the report as self-serving, for the reason it was not made under circumstances when there were any inducements whatever to record the facts other than as they actually occurred at the time. It was nothing more or less than a simple matter of bookkeeping in the usual course of business, without any thought of future litigation drawing the facts so recorded in question. It was by reason of the absence of such considerations at the time of making the report that it was there admitted in evidence. In this case the record of the facts, in the form of the conductor's report, was made for the very purpose of aiding appellant in possible future litigation with the respondent. To admit such evidence would be a clear violation of the rule against self-serving declarations, so tersely stated by Judge Dunbar in the *Callihan* case on p. 159, as follows:

"It may be stated that the general rule is that the previous declarations of a witness out of court, and not sworn to, are not admissible to sustain his evidence given in court. The reason for this rule is that such declarations are or might be self-serving, and, as has frequently been said, make a witness's credibility depend more upon the number of times he had repeated the same story, than upon the truth of the story itself."

We think the trial court correctly ruled in excluding this evidence.

Learned counsel for appellant contends that the trial court erroneously denied his motion for nonsuit at the close of respondent's evidence upon the trial, and also erroneously denied his motion for a new trial; both of which involved the sufficiency of the evidence to support a recovery by respondent. These two contentions are argued separately in appellant's brief, but in view of the fact it voluntarily proceeded with the trial and introducing evidence after the denial of its motion for nonsuit, the question of the sufficiency of the evi-

dence is to be determined in the light of all the evidence, and is not limited to the state of the evidence at the time of the non-suit motion. *Gardner v. Porter*, 45 Wash. 158, 88 Pac. 121. We have read the evidence brought here by statement of facts, and are convinced therefrom that there is ample evidence tending to show the negligence of appellant, and the nature and extent of the injuries to respondent resulting therefrom, if believed by the jury, to support their verdict.

As to the affirmative defense, that respondent was a gratuitous passenger traveling upon a pass, which was denied by her, the learned trial court fairly instructed the jury touching the legal effect upon her right to damages resulting from appellant's negligence if she was traveling upon such pass, leaving to the jury the question of whether or not she was then traveling upon such pass, or was a passenger for hire. Upon this question of fact the evidence was in conflict. She testified, however, directly and positively that she did not then possess any such pass, and that she then paid her fare in cash. It thus became a question for the jury to determine, which their verdict shows they resolved in her favor.

We find no error in the record and therefore affirm the judgment.

RUDKIN, C. J., DUNBAR, CROW, and MOUNT, JJ., concur.

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[No. 8345. Department One. December 13, 1909.]

F. P. WEYMOUTH, *as Receiver of the Oudin & Bergman
Fire Clay Mining & Manufacturing Company and
Thos. F. Conlan, Appellant*, v. CHARLES P.
OUDIN *et al., Respondents*.¹

CORPORATIONS—STOCKHOLDERS—RECEIVER—ACTION BY—ESTOPPEL—PERSONS AFFECTED. Where there are no creditors of a corporation and a receiver is appointed to wind up its affairs, and sues on claims, representing the rights of a faction of the stockholders, an estoppel against such stockholders operates against the receiver.

CORPORATIONS—STOCKHOLDERS AND TRUSTEES—DEADLOCK—FAILURE TO OPERATE PLANT. Where, owing to the obstinacy of two parties each owning one-half of the stock of a corporation, there was no board of trustees to manage its affairs, and the deadlock prevented an election, the parties are *in pari delicto*, and there can be no recovery by one from the other by reason of business losses, or failure to repair and operate the plant after a loss by fire.

Appeal from a judgment of the superior court for Spokane county, Kennan, J., entered May 3, 1909, upon findings in favor of the defendants, after a trial on the merits before the court, dismissing an action by the receiver of a corporation for an accounting and for damages. Affirmed.

R. L. Edmiston, for appellant.

W. J. Thayer, for respondents.

RUDKIN, C. J.—After a turbulent existence of twelve or thirteen years, the Oudin & Bergman Fire Clay Mining and Manufacturing Company, a corporation organized under the laws of this state, was dissolved by decree of the superior court of Spokane county, which was affirmed by this court on appeal. *State ex rel. Conlan v. Oudin & Bergman Fire Clay Min. & Mfg. Co.*, 48 Wash. 196, 93 Pac. 219. But though the legal entity is dead, the present action goes to show that its discordant elements still live. The corporation

¹Reported in 105 Pac. 1027.

has been repeatedly before this court in litigation with its stockholders, involving not only its rights but its legal existence, as will appear from the following citations: *State ex rel. Oudin v. Superior Court*, 28 Wash. 584, 68 Pac. 1052; *Bergman v. Oudin*, 30 Wash. 703, 70 Pac. 1135; *State ex rel. Oudin v. Superior Court*, 31 Wash. 481, 71 Pac. 1905; *Oudin & Bergman Fire Clay Min. & Mfg. Co. v. Conlan*, 34 Wash. 216, 75 Pac. 798; *Oudin & Bergman Fire Clay Min. & Mfg. Co. v. Cole*, 35 Wash. 647, 77 Pac. 1066; *State ex rel. Oudin & Bergman Fire Clay Min. & Mfg. Co. v. Superior Court*, 37 Wash. 30, 79 Pac. 483; *Oudin & Bergman Fire Clay Min. & Mfg. Co. v. Conlan*, 38 Wash. 134, 80 Pac. 283; *State ex rel. Conlan v. Oudin & Bergman Fire Clay Min. & Mfg. Co.*, *supra*; *Conlan v. Oudin*, 49 Wash. 240, 94 Pac. 1074.

Notwithstanding all this litigation, a perusal of the pleadings and testimony in this record would indicate that previous judgments go for naught. The pleadings are very voluminous, so much so, indeed, that a bare summary of the issues presented would extend far beyond the limits allotted to an ordinary opinion. However, we feel that the following brief history of the corporation and its affairs will sufficiently present the question for decision. During the early years of its existence the corporation was engaged in the manufacture of fire brick, sewer pipe and other clay products. At the outset, in 1893, its corporate stock of 1,500 shares was all held by two families, the defendant Charles P. Oudin, holding one share, his wife, Eva M. Oudin, holding 749 shares, and one Bergman holding the remaining 750 shares. In 1901 Bergman sold one-half his stock to one Conlan, and in April 1903, the remaining half, so that from the latter date to the date of dissolution the whole capital stock was held and owned by the Oudins and Conlan, each holding one-half thereof. Prior to the sale of the last of the Bergman stock, Oudin and Bergman were trustees of the corporation, which had but two trustees. The former

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was president of the board of trustees and treasurer, while the latter was vice president and secretary. Upon the sale of the last of the Bergman stock his office in the company became vacant, and the stockholders were unable to fill the vacancy. Whenever an attempt was made to do so the Oudins voted their 750 shares for Mrs. Oudin, Conlan voted his 750 shares for himself, and each refused to vote for the other. Matters remained in this condition up to the time of the dissolution of the corporation, and this was the principal if not the only reason assigned for its dissolution.

During the year 1902 and the early part of the year 1903 the corporation was in the hands of a receiver appointed by the superior court of Spokane county. In June of the former year, the defendant Charles P. Oudin was out of employment, and his brothers residing in New York agreed to advance the necessary funds to establish a modern fire brick and sewer pipe factory near Spokane, of which Charles P. Oudin should be manager. Oudin notified Conlan of this offer and Conlan told him to go ahead, that he had no desire to keep him out of employment. The defendant American Fire Brick Company was thereupon incorporated in June 1902, and during the ensuing few months it purchased real property and installed a new plant as proposed. The money for this purpose was advanced and contributed solely by the brothers of Charles P. Oudin residing in New York.

After the completion of the new plant it was leased to the old company for some time during the year 1903, and the two plants were managed and operated by the defendant Charles P. Oudin. Late in 1903 this lease was cancelled, and soon thereafter the plant of the old company was destroyed by fire, or nearly so. Before the destruction of its plant, litigation was only a diversion for the old company; but from that time on it became its chief and only business, the plant itself being abandoned. The receiver in this action was appointed upon the dissolution of the corporation, and seeks to recover from the Oudins, according to our analysis

of the complaint; first, the plant constructed by the American Company, on the theory that moneys belonging to the old company entered into its construction; second, an accounting; and, third, damages for loss of profits arising from the failure of the Oudins to repair the plant and conduct and carry on the business of the old company. It may not be out of place at this time to say that the rights of creditors are not involved; that any recovery will inure to the benefit of Conlan alone, who is the real party in interest, and that any estoppel against Conlan will prevail against the receiver who sues for his benefit.

In so far as the new company is concerned, there is not the slightest testimony in the record tending to show that any of the old company's funds went into its construction or operation. In fact the contrary is clearly and indisputably shown. It would serve no purpose to review the testimony on this point, for, from the standpoint of the appellant, there is nothing tangible to review. This also disposes of any claim for an accounting in so far as the new company is concerned. The appellant challenges the validity of the lease from the new company to the old, and also the right of the Oudins to pay out money or make disbursements on account of the old company. We think the finding of the court that the lease was valid is in accordance with the testimony, but in any event its validity would seem to have been adjudicated in prior actions. We also agree with the trial court that all moneys received by the Oudins have been fully accounted for, and all disbursements properly made, except as otherwise found by the court in its decree.

The appellant further claims damages arising from the failure of the Oudins to rebuild and operate the old plant. The nature of this contention will appear from the following offer of proof:

"If the court please, in order to preserve the record I desire at this time to show, to let the records show—we expect to show by this witness that at the time of the damage

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by fire to this plant that this estate was possessed of a pottery factory that \$2,500 would have repaired and put in as good condition as it was before the fire, to have been operated during the year 1903 and succeeding years, and that with those repairs this factory would have earned a net profit to the stockholders in addition to the necessary repairs and betterments thereon from time to time a sum of not less than \$6,000 per year for the years 1904-1905-1906-1907 and 1908 and that during these years the market for the product of such a factory was such as to have given a ready market to dispose of all these goods and that at this time such a plant would be worth not less than—such a plant and extensions thereto that could have been developed at this plant down on what is known as the Chicken Ranch Pottery premises,—of not less than \$50,000 and these profits that could have been made at this factory in the city of Spokane and the moneys that were on hand at the time that receiver Cole was discharged and turned the property back to the company, to wit, \$2,000 in cash, a little less than that—to wit, \$1,990 in cash and \$889 in good accounts and merchandise, the market value of which was over \$5,000; that the profit of the plant during the year 1903, that the profits there would have been about \$8,000 over and above the expenses of operating; which with the auxiliary plant that could have been installed in the factory building owned by this company at Mica, Washington, which is adequate for a modern pottery factory, at which time there was one kiln of 20 ft. in diameter and a brick stack adequate to carry three other kilns, all of which could have been equipped and put in operation by the opening of the season of 1904 at an expense not to exceed the amount of cash available, or about \$16,000—which plant at Mica could have been operated at a profit of not less than \$6,000 during the years 1904, 1905, 1906 and 1907 and that our plant at this time would be worth not less than \$50,000.”

Manifestly no such duty rested upon the Oudins. There was no board of trustees, and no person authorized to act for the corporation. For this state of affairs the Oudins and Conlan were equally responsible. Neither party had any right of action against the other by reason of the manner in which the stock was voted or for the refusal of either to vote

for the other. When the stockholders found the corporation without a board of trustees to manage its affairs, two courses were open to them, one to reorganize the board, the other to dissolve the corporation and divide its property. Their obstinacy prevented the former, the law compelled the latter. No doubt had these parties devoted the energies they have displayed in this litigation to some legitimate purpose they would have something to show for it besides an accumulation of costs and a wrecked business, but under the circumstances neither can charge their failures or misfortunes to the other. They are *in pari delicto* in that respect. We have not deemed it necessary to refer to the assignments of error, but the foregoing will sufficiently disclose the reasons for our judgment.

The judgment is affirmed, and we think the peace of society and the ends of justice will be best subserved by closing this receivership at the earliest possible date.

GOSE, MORRIS, FULLERTON, and CHADWICK, JJ., concur.

[No. 8245. Department One. December 14, 1909.]

CLARENCE D. HILLMAN, *Respondent*, v. FRANK M. STANLEY,
Appellant.¹

PLEDGES—COLLATERAL SECURITY—ACTION BY PLEDGEE—LIMIT OF RECOVERY—BILLS AND NOTES. The indorsee of a note, taken by him as collateral to a loan, is the owner of the note, and may recover the full amount, regardless of the state of his account with the indorser, in the absence of any defense against the indorser.

BILLS AND NOTES—ACTIONS—DEMAND—NECESSITY. Presentment and demand is not a condition precedent to an action upon an ordinary overdue promissory note.

BILLS AND NOTES—ATTORNEY'S FEES—REASONABLENESS—EVIDENCE—ADMISSIBILITY. In an action on a promissory note, upon an issue as to a reasonable attorney's fee, it is inadmissible to show that

¹Reported in 105 Pac. 816.

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the plaintiff's attorney attended to all of plaintiff's business under an annual retainer and contract for stated fees in each case.

APPEAL—REVIEW—EVIDENCE—HARMLESS ERROR—TRIAL DE NOVO. Prejudice of the trial judge is not ground for a reversal, where the action was tried without a jury and is heard *de novo* on appeal, and the evidence abundantly supports the findings.

Appeal from a judgment of the superior court for King county, Warren, J., entered November 30, 1908, upon findings in favor of the plaintiff, after a trial on the merits before the court without a jury, in an action on a promissory note. Affirmed.

John E. Humphries and *Geo. B. Cole*, for appellant.

Frederick R. Burch, for respondent.

FULLERTON, J.—This action was brought to recover upon a promissory note executed by the appellant as maker to one George Mead as payee, and by Mead indorsed to the respondent. The action was begun originally against the appellant and his wife in an effort to charge the community property of the appellant and his wife with the lien of any judgment that might be obtained in the action; it being alleged that the note was given for a community debt. A trial was had resulting in a judgment against both husband and wife. Subsequently, however, the respondent moved to dismiss the action as to his wife, and an order was entered to that effect in the records, although the judgment itself seems not to have been amended in that particular. Thereafter this appeal was taken.

The appellant, in his answer, alleged that the note was received by the respondent as collateral security to an indebtedness owing by Mead to the respondent. This allegation was not denied in the reply, and the appellant now insists that it is a defense to the note *pro tanto*—that is to say, the respondent cannot recover from the appellant any greater sum than was owing him by Mead. But this is not the rule.

The indorsee of a promissory note, even though he took it as collateral to a loan, is the owner of the note, and can collect the full amount of the sum from the maker regardless of the state of the account between the indorsee and the person from whom he received it. If the maker had a defense against the note in the hands of the indorser a different question would arise, but no such contention is made in the pleadings in this case. It is true the appellant at the trial asked leave of the court to amend his answer by setting out a plea of want of consideration for the note, but the facts recited by him on which he based the application did not constitute failure of consideration, and the court committed no error in refusing the request.

The appellant next contends that it was necessary for the appellant to plead and prove a presentment to the maker and demand for payment before a recovery could be had. But this contention is not tenable. The note was an ordinary promissory note payable in money to the payee or his order, and was overdue when the action was brought. The action itself is in such cases a sufficient demand.

The note provided for the payment of a reasonable attorney fee in case suit or action should be brought to collect same. After the respondent had offered evidence tending to show a reasonable attorney fee, the appellant sought to show that the attorney representing the respondent was the respondent's regular counsel, receiving from him an annual retainer, and in addition thereto a fixed sum for all actions prosecuted or defended for and on behalf of the respondent. This evidence was, we think, rightly rejected by the court. The respondent could recover no more than a reasonable attorney fee, no matter what sum he had agreed to pay his attorney for prosecuting the case. It might have been some evidence of the unreasonableness of the fee claimed to show that he had made a contract with his attorney to prosecute the particular case for a less sum than he claimed in his pleadings to be a reasonable sum, but it would be no evi-

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dence of what a reasonable sum would be in the particular case to show that the attorney bringing the action had a contract with his client calling for a general retainer and for a fixed sum for each action brought. That the fee allowed considered as a fee for the particular case is reasonable is not questioned by the appellant.

Finally, it is contended that the court manifested such spleen towards the appellant and his counsel that a new trial should be awarded on the ground of prejudice. In one instance, while addressing appellant's counsel, the court did use language more sarcastic, perhaps, than the circumstances warranted, but this is not sufficient ground for a new trial in a case tried by the court without a jury, and which is triable *de novo* in the appellate court. There was abundant evidence to warrant a recovery, and the judgment will stand affirmed as corrected by the court.

RUDKIN, C. J., CHADWICK, MORRIS, and GOSE, JJ., concur.

[No. 8246. Department One. December 14, 1909.]

COLUMBIA AND COWLITZ RIVER BOOM AND RAFTING COMPANY,
Appellant, v. JAMES H. HUTCHINSON *et al.*,
Respondents.¹

NEW TRIAL—EXCESSIVE VERDICT—DISCRETION OF TRIAL JUDGE—APPEAL—REVIEW. A remark by the trial judge to the effect that when the verdict was first returned he considered it excessive, but later concluded that he might be wrong and the verdict not excessive, does not show that the party was entitled to a new trial as a matter of right because of an excessive verdict; and the refusal of a new trial will not be reversed where no abuse of discretion appears.

EMINENT DOMAIN—COMPENSATION—VALUE OF LAND—BOOM SITE. In condemnation of shore and uplands needed by a boom company for booming purposes, the jury may take into consideration the value of the land as a boom site, where the defendants are owners of the shore as well as the uplands.

¹Reported in 105 Pac. 636.

Appeal from a judgment of the superior court for Cowlitz county, McCredie, J., entered April 10, 1909, upon the verdict of a jury rendered in favor of the defendants, awarding damages in condemnation proceedings. Affirmed.

A. L. Miller, for appellant.

Finn & Lomax, for respondents.

FULLERTON, J.—The appellant is incorporated under the laws of the state of Washington as a boom company, and maintains and operates a boom for catching, assorting and rafting logs, on the Columbia river, near the mouth of the Cowlitz. The respondents own the uplands and the shore lands in front thereof lying adjacent to appellant's boom. The appellant found it necessary, in order to successfully maintain and operate its boom, to use a portion of the lands of the respondents, and to cut them off from their littoral and riparian rights. This action was brought to condemn the land necessary for the use of the boom and to ascertain the just compensation to be made to the respondents for the property so taken and damaged. At the trial the jury returned a verdict in favor of the respondents for the sum of \$3,500. A motion for a new trial was made by the appellant based on the ground that the verdict was excessive. This motion was overruled, and a judgment entered on the verdict. This appeal was taken therefrom.

The first assignment of error relates to the refusal of the court to grant a new trial. On passing upon the motion therefor, the judge used this language:

"In this case the court has felt that the verdict was excessive; in fact, higher than the entire land of the defendants is worth. However the court may be mistaken. . . . While the land has little value, yet the waterfront, at the mouth of the Cowlitz river in itself may have considerable value, and the property was the defendants. Since I have heard of some purchases of deep waterfront outside of city limits at fabulous figures, I have been inclined to think maybe this verdict is not excessive, and my own ideas wrong."

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The appellant argues that these remarks bring the case within the rule of *Clark v. Great Northern R. Co.*, 37 Wash. 537, 79 Pac. 1108, where we held that it was the duty of the trial judge to grant a new trial when, after giving full consideration to the evidence in the light of the verdict, he was still satisfied that the verdict is against the weight of the evidence, and that substantial justice has not been done. But the cases are not parallel. In that case the trial judge announced it as his deliberate conviction that the weight of the evidence did not sustain a certain element necessary to be shown in order to permit a recovery, but that he was without power to correct the error as there was some evidence to support the finding, and he was not at liberty for that reason to disturb the finding. This court reversed the case for the reason that the trial judge failed to exercise a power with which he was fully vested, and which he failed to exercise because of the belief that he was not vested with it. But in the case at bar, the trial judge had no doubt of his power to grant a new trial on the ground of insufficiency of the evidence to support the verdict, even though every element essential to a recovery was sustained by evidence. As we interpret his remarks, he meant to say that when the verdict was first returned he felt that it was excessive, but on more mature consideration he had changed his mind and was inclined to agree with the jury. At any rate, since his refusal to grant a new trial was not based on a misapprehension of his powers or duties, this court must treat his refusal as an exercise of his discretion in that regard, and reviewable for manifest abuse only.

Whether the verdict was in fact excessive is a more difficult question. Based upon the value of the land for agricultural purposes, it could not be justified under the most favorable view of the evidence. But the land was valuable as a boom site, and the jury had the right to take that fact into consideration in making up their verdict; and in viewing the verdict in the light of such fact we are unable to say it is ex-

cessive. Moreover, in addition to the evidence contained in the record, the jury and trial judge had the advantage of a view of the premises, and could thus test the accuracy of the statements of the witnesses by their own observations. This fact makes us less reluctant to approve their findings.

The instruction of the court given in this case, to the effect that the jury in making up their verdict could take into consideration the value of respondents' premises as a boom site, does not conflict with the rule announced by this court in the case of *Grays Harbor Boom Co. v. Lownsdale*, 54 Wash. 83, 102 Pac. 1041, 104 Pac. 267. The distinction between the cases lies in the fact that in the present case the respondents are the owners of the shore as well as the uplands, and the appurtenant littoral and riparian rights that attach to ownership of shore lands in this state; and furthermore, for the successful operation of the boom it is necessary to use a part of the uplands. It was not so in the case referred to. There the boom company itself owned the shore lands with the accompanying littoral and riparian rights, and it was not sought to appropriate any part of the uplands further than for a right of way for the passage of its employees, and possible consequent erosion caused by the use of the shore lands in front of the uplands as a booming place for logs. In other words, the use of the claimant's property in that case was not absolutely essential to the successful operation of the boom, but was rather a convenience than a necessity, while in the case at bar the boom cannot be operated at all without making use of the respondents' property.

The judgment is affirmed.

RUDKIN, C. J., CHADWICK, MORRIS, and GOSE, JJ., concur.

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[No. 8352. Department Two. December 14, 1909.]

CHRISTOPHER CARRUTHERS, *Respondent* v. O. B. WHITNEY
et al., *Appellants*.¹

ESTOPPEL — EQUITABLE ESTOPPEL — REPRESENTATIONS. The doctrine of equitable estoppel applies in cases not reached by common law estoppel by deed or records, and where a person wrongfully or negligently causes another to rely upon acts or representations to his prejudice.

EXECUTORS AND ADMINISTRATORS—SALE OF LAND—ESTOPPEL TO CLAIM INDIVIDUALLY. An administratrix whose property was included in the inventory of the estate, and who petitioned for its sale as properly belonging to the estate, and made a deed conveying the same in terms upon payment of the price bid, is estopped to deny the validity of the deed or to assert her individual ownership or title thereto; especially where she agreed with creditors that it be sold as property of, and represented to the purchaser that it belonged to, the estate.

Appeal from a judgment of the superior court for Whatcom county, Hardin, J., entered April 27, 1909, upon findings in favor of the plaintiff, after a trial on the merits before the court without a jury, in an action to quiet title. Affirmed.

Merrick & Mills, for appellants.

Robert McMurchie, for respondent.

DUNBAR, J.—This is an action to determine adverse claims to a tract of land in Whatcom county, Washington, the action being brought by the respondent to quiet title to the same. Upon the trial of the case, the court found in favor of the plaintiff, judgment was entered in accordance with the prayer of the complaint, and appeal followed.

Both parties claim under one Emil Freiner, who died intestate in Snohomish county, Washington. The premises in controversy were concededly acquired by Emil Freiner under the homestead laws of the United States, patent therefor being issued to him September 28, 1898, and duly re-

¹Reported in 105 Pac. 831.

corded. On November 4, 1903, Freiner executed and delivered to his wife, Frances, a deed conveying the premises in controversy, which deed was duly recorded. After Freiner's death a petition for the probate of his estate was filed in the superior court of Snohomish county, and letters of administration were issued to Frances by said court. An inventory was made by the administratrix, and filed in the superior court of Snohomish county August 9, 1904. On September 28, 1904, the administratrix filed in such superior court a petition to sell real estate. The inventory included the lands in controversy. There was some question about the description of the land, which was afterwards cured, and it is now a conceded fact that all the lands in controversy were included in the order of sale, and were intended to have been included in the inventory and petition.

On the 1st day of October, 1904, the superior court issued its order to show cause why an order should not be granted to sell certain real estate at private sale, and on the 19th of October an order was made directing the giving of notice to creditors. Notice of sale of real estate was given, and the same was published. Thereafter the administratrix made her report of sale to the court, and the court fixed a date for hearing. Notice was given of such return day. Thereafter, on the 24th day of November, 1905, an order was made confirming the sale of such real estate, being the real estate in controversy here, to one Daniel Neeson, who paid to the administratrix the sum of \$650 for said land, and the administratrix executed and delivered certain deeds conveying the said land in statutory form.

The court found the facts which we have briefly recited; that the administratrix had petitioned and prayed for authority to sell the real estate in controversy; that it was sold and confirmed, and that the deeds were made to Neeson as aforesaid; also found that the defendant O. B. Whitney, subsequent to the conveyances aforesaid, obtained, for a

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consideration of five dollars, a quitclaim deed from the said Frances Freiner to the land in controversy, which said quitclaim deed was duly filed in the auditor's office of Whatcom county; that at and prior to the taking of the quitclaim deed, the defendant Whitney knew of the execution and delivery by said administratrix of the deeds aforesaid to the said Neeson, and of the subsequent conveyance to the Keith Investment Company by said Neeson. It appears in the proceedings that the Keith Investment Company sold the said land to the respondent. The court found that the said Frances Freiner never took under the deed from Emil Freiner, and never made any claim individually to said real estate, and that, prior to the sale thereof by her as administratrix, she had a conversation with Daniel Neeson, the purchaser at such sale, in which she represented to said Neeson that she was selling the whole of such real estate as the property of the estate of Emil Freiner, deceased.

Many exceptions are taken to the findings of the court by counsel for appellants, but there is only one pertinent proposition in this case, and that is whether the administratrix is estopped from raising the question of the validity of the sale to Neeson. It must be conceded that Whitney can take no better title to the land than his grantor, Mrs. Frances Freiner, had. The findings of the court, we think, are substantiated by the record in the case, most of which is documentary. It is the contention of the appellants that the status of this property as community property continued until, by reason of some act of the parties or by reason of the law, such status changed, and that such change occurred upon the execution and delivery of the deed from Emil Freiner to Frances Freiner; that the court had no jurisdiction to order the sale of the property which by public record appeared to be the property of Frances Freiner; that it is a fact which exists that gives the court jurisdiction to sell real estate, and not the representations made in the declaration of the administratrix through the inventory filed.

Many cases are cited by counsel for appellants to the effect that an administrator who sells his own property as property of the decedent is not estopped from claiming title to his own property notwithstanding such sale, and no doubt there are many authorities to this effect as a general proposition.

The first case which is strongly relied upon by the appellants is *Anthony v. Chapman*, 65 Cal. 73, 2 Pac. 889. In that case the general doctrine contended for was no doubt announced in the syllabus, viz., that an executor who represents in his petition for letters testamentary that certain property belonged to the estate of the decedent, and files an inventory including such property, is not thereafter estopped from claiming the property as his own. But upon an examination of the case itself, the syllabus may be considered as too broad. In that case the property did not go to sale. The plaintiff claimed under a conveyance from one Bird to Mary A. Smith. The defendants claimed that this conveyance was made to Mary A. Smith in trust for one J. P. Smith who, they claimed, paid the consideration therefor and from whom they derived title. Mary A. Smith left a will appointing J. P. Smith her executor. He applied for letters testamentary and, in his petition, represented that the property in controversy was a portion of the estate of the testatrix, and also included it in the inventory of the estate filed by him. J. P. Smith died pending the administration, and the plaintiff was appointed administratrix with the will annexed, and hence the contest over that particular portion of the property. The court decided the case somewhat upon the testimony, saying that there was no direct evidence that Mary A. Smith did not pay for the property, and that there was a conflict of evidence as to who actually paid the purchase money. The alleged trustee and beneficiary both died before the commencement of the action. All that the court said on this proposition is the following:

“The appellant contends that [plaintiff] by representing

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in his petition for letters testamentary of the will of Mary A. Smith, that said property belonged to her estate, and filing an inventory of her estate which included said property, J. P. Smith was estopped from afterwards claiming that it was his own. In *Carter v. McManus*, 15 La. Ann. 676, the court says, 'that admissions made by an executor or administrator in the course of judicial proceedings are made for the benefit of the estate represented by him, and do not conclude his individual right by way of estoppel.' Another case very much in point is *Werkheiser v. Werkheiser*, 3 Rawle 326. The facts in this case fall short of what is required to constitute an estoppel."

So that it will be seen that that case was decided on the authority of *Carter v. McManus*, 15 La. Ann. 676, and of *Werkheiser v. Werkheiser*, 3 Rawle 326. An examination of those cases elicits the fact that they fall far short of the matters which are claimed to be matter of estoppel in this case. In *Carter v. McManus* all that was decided was that an application, made by the executor named in the will to have the will probated, was not a judicial admission which would estop the executor from claiming as his own property disposed of in the will. In *Werkheiser v. Werkheiser* it was decided that the presentation of a petition to the Orphans' court, setting forth that the petitioner's father died seized of the premises therein described, leaving a widow and seven children, and praying the court to award an inquest, to make partition, etc., does not estop the petitioner from afterwards maintaining an ejectment for the same premises, and proving that they were the estate of his mother who was his father's first wife, and descended to him as her heir, to the exclusion of his brothers and sisters, the children of a second wife. Under such circumstances the court said that such allegations would in most cases operate very slightly, if at all, against him; that nothing more was done in the case; that the plaintiff committed an error in presenting the petition and probably, upon discovering his mistake, relinquished the proceedings under it and adopted an action of

ejectment. In none of these cases was the land sold and other parties misled to their injury.

The American Law of Administration by Woerner, § 480, cited by the appellants, only announces the undoubted rule that, so far as covenants and words of warranty in an administrator's deed are fairly referable to their official capacity or duty, their effect is limited to the estate alone, and they in no manner affect the personal right or liability of the administrator; citing the instance that, where a widow administratrix in executing specific articles of sale by her deceased husband under order of the Orphans' court, conveyed all her husband's estate and her own, in law and equity she was held not barred of her dower which was the only interest she had in the land. Many of these cases are dower cases, where the wife's right is more or less a technical right, and it would be reasonable to suppose that she might not think when she was selling the estate of the husband that there would be any claim that her dower would be conveyed.

A very positive, and it seems to us somewhat dogmatic, statement is made in *Baker v. Brickell*, 87 Cal. 329, 25 Pac. 489, 1067, a case cited by appellants, where the court, noticing this phase of the case, says:

"The other circumstances, viz., the facts that Maria Baker qualified and was appointed administratrix of John H. Baker, and put the land in suit on the inventory returned by her to the probate court as assets of her intestate's estate in the administration of the estate, are entirely immaterial. We are aware of no law by which a person appointed administrator loses his land by so acting. There is no estoppel on Maria Baker to claim her own property under such circumstances. She no doubt acted in this matter through ignorance of her rights, or, if advised at all, from having been improperly counseled."

This, as a general proposition, we think is probably too sweeping a statement of law, the question of estoppel being largely a question of fact. We think it unnecessary to re-

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view cases cited by counsel for respondent. They announce squarely the other doctrine, viz., that under such circumstances the administrator, or administratrix as the case may be, is estopped.

But these cases must all be considered with reference to the particular circumstances involved in the case. It makes no difference in this particular case whether the court acted with jurisdiction to sell the property. The deed of the administrator conveyed the property in terms to the purchaser, and in terms it was a deed, and the only question is whether, under the circumstances as shown by the record, the administratrix is estopped from questioning its validity and asserting her own title. Estoppel is an equitable proceeding, or speaking more accurately perhaps, it is the equitable result of a wrongful proceeding or act, a reliance upon which would, in the absence of an estoppel, work an injustice to an innocent person. At the common law estoppel was founded on deeds and records of courts, but estoppel in equity is estoppel *in pais*. The principle now applies because it has been found that the common law rule was too narrow and inadequate for the attainment of justice under the multiplied transactions of modern times, and hence the equitable estoppel of the present day. The well-understood idea of equitable estoppel is that, where a person wrongfully or negligently by his acts or representations causes another who has a right to rely upon such acts or representations to change his condition for the worse, the party making such representations shall not be allowed to plead their falsity for his own advantage.

This is an extreme case, where there can be no question that the doctrine of equitable estoppel should apply. We would not lay down the harsh rule, such as seems to have been laid down in some cases cited by the respondent, that under all circumstances the representations made by an administratrix, through inventory filed, would estop her from questioning the conveyance of her own interest; for there

might be an honest mistake which in good conscience she ought to be allowed to show or explain away. But in this case the representation was not only made in the declaration of what property belonged to the estate, but by petition to sell, by solemn deed of conveyance, by holding out to the world, and especially to the respondent, that the property which the administratrix now claims was the property of the estate, whereby she obtained, presumably as an heir of Freiner, an interest in the money obtained for the land sold. But the record also shows that the creditors of this estate had raised some question as to the validity of the sale to Mrs. Freiner, and that it was agreed between the administratrix, through her attorney, and the creditors, through their attorney, that this particular piece of land should be sold as property of the estate. It also shows that personally she represented to the purchaser that he was to receive title to all of the estate described in the inventory, if he would bid upon the same. Under such circumstances it would be an outrage upon justice to permit the administratrix or her grantee to question the validity of the deed conveying the property in controversy.

The judgment of the court is affirmed.

RUDKIN, C. J., MOUNT, CROW, and PARKER, JJ., concur.

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Statement of Case.

[No. 8368. Department One. December 14, 1909.]

NORTH COAST RAILWAY COMPANY, *Appellant*, v. JULIA HESS
*et al., Respondents.*¹

EMINENT DOMAIN — PROCEEDINGS — PROPER PARTIES — MORTGAGEE AND LIENORS. Under Bal. Code, § 5638, providing that notice in condemnation shall be served on the owner, encumbrancer or tenant or person otherwise interested in the land, mortgagees, lien claimants, and a city having a lien for assessments, are proper parties defendant.

SAME—LIENORS—RIGHT TO AWARD—EQUITABLE RIGHT OF COMPANY TO DISCHARGE OF CLAIMANTS NOT PARTIES. Where, in condemnation proceedings, the railway company failed to make a mortgagee and lien claimants parties defendant, and they failed to come in voluntarily under Bal. Code, § 5644, and claim an interest in the award of damages, their liens against the property were not affected by an award of damages for the full value of the land, paid into court; but they have the same rights in equity against the fund representing the land as they had against the land, and as though they had been claimants under the statute; hence the railway company, having paid full value, had an equitable right, irrespective of statute, to be protected against the liens through proper control of the funds in court; and it was error to order the fund paid to the owners without discharge of the liens, against objection by the company.

SAME—RIGHT OF TENANTS. In such a case, a specific sum awarded to the tenant in possession as the value of his leasehold may properly be ordered paid to him.

Appeal from an order of the superior court for Yakima county, Preble, J., entered February 16, 1909, vacating a show cause order and dismissing a petition to return money withdrawn from the registry of the court after payment thereof on an award of damages in condemnation proceedings. Affirmed in part and reversed in part.

Danson & Williams, H. J. Snively, and Hamblen & Gilbert,
for appellant.

Englehart & Rigg, for respondents.

¹Reported in 105 Pac. 853.

MORRIS, J.—The North Coast Railway Company brought suit in Yakima county to condemn lot 5, in block 210, of the original town of North Yakima, for railway purposes. In this suit Julia Hess as owner, and A. N. Miller and wife as lessees, were made defendants, and on December 21, 1908, the court rendered judgment awarding Julia Hess, as owner of the lot, the sum of \$15,930.26, and Miller and wife, as lessees, the sum of \$521.74, which sums were on said day paid into court by appellant. On the same day the court made and entered its order, reciting that “it appearing to the court that there is a claim that liens exist against said property, it is therefore ordered that said money be not distributed by the clerk of this court until the further order of this court.” On December 29 the court made an order directing the payment of the money to respondents Hess and Miller, and upon such order the money was withdrawn from the registry of the court. On January 8 the appellant filed a petition reciting that the lot was encumbered by a mortgage of \$2,500, wholly unpaid and not yet due, by a materialman’s lien in the sum of \$1,914.26, and an assessment for paving of the street in front in the sum of \$585. A copy of this petition was served on the prospective lienors, and it prayed that the money withdrawn by Hess and Miller be returned to the registry of the court, and that a time be fixed in which the original defendants and the lienors referred to in the petition should appear in court and show cause why the judgment should not be used in the satisfaction and release of the respective encumbrances. A show cause order was issued, returnable February 16, on which day the court made and entered an order vacating the show cause order and dismissing the petition, from which order so made and entered “and from each any every order made by said court,” the railway company has appealed, assigning as error the order of December 29, directing the payment to Hess and Miller, the refusal to grant the relief as prayed for in the petition

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of January 8, and the vacating of the show cause order, and dismissal of the petition.

Under our eminent domain law the mortgagee, the lien claimant, and the city of North Yakima were proper parties to the condemnation suit, the statute (Bal. Code, § 5638), providing that notice shall be served on the owner, encumbrancer, tenant, or person otherwise interested in the property sought to be appropriated. It is further provided (Bal. Code, § 5644), that any person or corporation claiming to be entitled to any money paid into court in the condemnation proceedings, may apply to the court therefor, and the court, upon being satisfied of the correctness of the claim, has power to make an order directing the payment to the claimant, or if in the court's judgment it be necessary, it may require the bringing of an action in which conflicting claims might be determined. When, therefore, the railway company failed to make the mortgagee, the lien claimant, and the city defendants, the right was offered them to voluntarily submit themselves and claims to the jurisdiction of the court and have their claims against the property adjudged in that proceeding, or, in case of a contest by the owner, have the payment to the owner withheld until in some proper proceeding the claims could be established. Neither of these provisions of the statute having been complied with, their liens against the property were in no wise affected in the eminent domain proceedings, and, although the judgment has determined the full value of the property, it is still subjected to these various liens to the same extent as before the commencement of the appropriation suit.

The full value of the property was fixed at \$15,930.26. The aggregate of these liens is \$4,999.26. The railway company then, having paid the full value of the property, must, unless it can be protected in the present proceedings, pay an additional sum of \$4,999.26, or such less sum as it may be determined is the true value of these liens, before it can claim an unincumbered title to the property ap-

propriated, a payment against which equity and good conscience revolt. When the railway company paid into court the sum determined by the judgment to be the full value of the land to be taken, the sum so paid represented the land itself, and these various lienors had the same claim upon this fund for the satisfaction of their claims as they had against the land itself, notwithstanding the fact that their claim of record was only against the land. *Omaha Bridge etc. R. Co. v. Reed*, 69 Neb. 514, 96 N. W. 276; *Calumet River R. Co. v. Brown*, 136 Ill. 322, 26 N. E. 501, 12 L. R. A. 84; *Watson v. N. Y. Cent. R. Co.*, 47 N. Y. 157; *Utter v. Richmond*, 112 N. Y. 610, 20 N. E. 554. They were, therefore, among the persons described in the statute as claimants against the money paid into court by the railway company, and while this right exists here by virtue of the statute, it is the rule, supported by the great weight of authority, that the right is an equitable one and needs no statutory authority for its exercise and enforcement, and this irrespective of whether they were or were not made parties to the proceedings. *Platt v. Bright*, 31 N. J. Eq. 81; *Gray v. Case*, 51 N. J. Eq. 426, 26 Atl. 805; *Philadelphia etc. R. Co. v. Pennsylvania etc. R. Co.*, 151 Pa. 569, 25 Atl. 177; *South Park Com'rs v. Todd*, 112 Ill. 379; *Bank of Auburn v. Roberts*, 44 N. Y. 192.

The railway company has the same equitable right to be protected by this fund, as against the lienors, notwithstanding that after its payment into court it had no legal right or interest in the money. Nor having failed to make the lienors defendants in the appropriation proceedings, could it in law defend as against their true liens. *Platt v. Bright*, *supra*; *Philadelphia etc. R. Co. v. Pennsylvania etc. R. Co.*, *supra*.

In the New Jersey case it is said:

"But though such are the relations of the complainant and the railroad company at law, it is very clear that the latter, having paid the full value of the land and damages without deduction for or regard to encumbrances, has, under

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the circumstances, the right in equity to protection as against the lien of the mortgage."

In the Pennsylvania case the court says:

"It is admitted that there are mortgages and judgments to a large amount against the owner, which were liens upon the land at the time of its appropriation, and that the lien creditors have a claim upon the sum awarded, which a court of equity, on their motion, will recognize and enforce. But it is contended by the owner that the appellant has no standing to invoke the aid of the court in behalf of the creditors, and that the order applied for is not necessary for its own protection. The case therefore involves a consideration of the respective rights of the owner, the appellant, and the lien creditors. It is the undoubted right of the owner to institute and maintain proceedings for the recovery of the damages resulting from the appropriation of its land, and to have the full benefit of the same. These damages are the price of the easement, and, on payment of them, the appellant has a right to an unincumbered title. If the appellant receives that for which it pays, and the price of the easement is passed directly to the owner, the real estate security of the lien creditors is impaired to that amount, and their sole reliance for it is the personal responsibility of the owner. If, on the other hand, the security of the lien creditors is not affected by the condemnation proceedings, and the appellant has paid the owner without notice to them, it has not acquired an indefeasible title to the easement, but a title which may be directed by a sale on the mortgage or judgment liens."

It follows then that, when the court was apprised of the existence of these liens against the lot appropriated, it was its duty to protect both the lien claimants by seeing that their security was not diminished, and the railway company by seeing that it received that which it had paid full value for as determined by the court's judgment. It was the further duty of the court to give effect and sanctity to its own judgment, and make it speak the truth in awarding the sum established by it as the full value of the land appropriated; and as the rights of the lienors and the railway

company needed no statutory recognition, but rested in equity, so the duty of the court in this respect needed no statutory requirement, but likewise rested in equity. *Bright v. Platt*, 32 N. J. 362; *Crane v. City of Elizabeth*, 36 N. J. Eq. 339.

In the former of these two cases, it is said:

“It is the plain right of the company to have this fund withheld from the mere legal owners until the claims of the mortgagees are extinguished; it is the plain duty of the mortgagees to see that the fund is not paid out to the appellants without an assertion of their own claims upon it; and it is the plain duty of the court to dispose of the fund in the same manner as it would have disposed of the land for which the fund is substituted.”

In the latter case the court says:

“But if, in any special case, this owner ought not, in equity, to receive the fund, the court of chancery will, at the instance of any interested complainant take charge of its proper distribution.”

To the same effect is *Platt v. Bright, supra*, wherein upon this point it is said:

“But the power to make such distribution is not derived from the statute alone. It arises independently of it, from the necessities of the administration of justice, and is inherent in this court.”

See, also, *Wooster v. Sugar River Valley R. Co.*, 57 Wis. 311, 15 N. W. 401.

It was error, then, for the court, by its order of December 29, to direct the payment of the award representing the value of the land, to respondent Hess. It was likewise error to vacate the show cause order and dismiss the appellant's petition as against respondent Hess. Having by its order directed the payment of this award to the wrong person, in the light of the equities of the situation, it was the duty of the court to remedy its error in so far as it could, and issue its further order directing the repayment of the money into the registry of the court, there to await the final decree of

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the equities of the various parties; and while the court had no power to compel the lien claimants and the owner to contest the equities of these various liens in this proceeding, its equitable powers were ample to make appropriate orders for the protection of all persons known to it to have any interest in the fund under its control. The payment to respondent Miller was not error, as his interest was separate and distinct from the value of the land, and irrespective of that value he was entitled to his damages for the disturbance of his leasehold.

The rulings appealed from are reversed, except as they affect respondent Miller, as to whom they are affirmed. The remaining respondents, save Hess, are not in any wise affected by this ruling. They not having been parties to the condemnation suit, nor properly made parties by appellant's petition and its service upon them, they have no proper place in this appeal.

The cause is remanded for such further proceedings as may be in accord with the views herein expressed.

RUDKIN, C. J., FULLERTON, CHADWICK, and GOSE, JJ., concur.

[No. 8097. Department Two. December 15, 1909.]

G. H. CUNNINGHAM, *Appellant*, v. FRANK W. B. MORRIS
*et al., Respondents.*¹

CORPORATIONS—SUBSCRIPTION TO STOCK—NOTES FOR PRICE—DEFENSES—FRAUD—ESTOPPEL. Statements in fine print in a signed application to purchase corporate stock do not estop the maker of promissory notes given for the price of the stock from setting up the defense of want of consideration and fraudulent representations, although technically construed the statements might be deemed admissions contrary to the facts proven.

Appeal from a judgment of the superior court for King county, Griffin, J., entered January 7, 1909, upon findings

¹Reported in 105 Pac. 839.

in favor of the defendants, after a trial on the merits before the court without a jury, in an action on a promissory note. Affirmed.

Carrico & Durk, for appellant.

Shorett & Shorett, for respondents.

PARKER, J.—The appellant commenced this action in the superior court to recover from respondents the sum of \$2,000, alleged by him to be due upon a promissory note executed and delivered to him by respondent Frank W. B. Morris, on January 29, 1908, in payment of 8,000 shares of the capital stock of the Geminoid Manufacturing Company, a corporation, on that day sold and issued to him by appellant, acting in behalf of said company as its president and general stock sales agent. The respondents, by their answer, pleaded as a defense want of consideration and fraudulent representations made to respondent Frank W. B. Morris by appellant at the time inducing the purchase of the stock and giving of the note. A trial before the court without a jury resulted in findings and judgment in favor of defendants, from which plaintiff has appealed to this court.

The record shows that while the note was executed to appellant as payee, he was, in the original transaction and is in the prosecution of this cause, acting for the company. Upon the question of want of consideration and fraudulent representations, the court found as follows:

“That there was no consideration for said note except the issuance of certain shares of stock, which were tendered back to said plaintiff and to said company, and the following representations were made to the defendant, Frank W. B. Morris, by the plaintiff who was then acting as agent of said corporation; that the company was engaged in the manufacturing business in this city; that it owned its own factory site; that it was about to erect a factory on said site for the purpose of manufacturing said goods, and that the company was on a sound financial basis and had abundance of money back of it to carry out said plans.

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"That said representations were false and known to be so by the plaintiff at the time. That the company was not engaged in the manufacturing business in this city, and it never engaged in the manufacturing business as aforesaid at any time or in any place; that it did not own its factory site then and had never owned a factory site in King county; that it did not erect a factory on said site and did not erect a factory on any other site for the purpose of manufacturing rubber goods; that the company was not on a sound financial basis then and never has been able to carry out its plans.

"That the defendants were ignorant of the fact and believed and relied upon said representations and were thereby induced to purchase said stock and give said note, it being understood and agreed that unless the purposes for which the company was organized, namely, the building of a factory and the manufacturing of goods were not carried out within a period of sixty days, then said note was to be returned to said defendants, and they were to turn over said stock and the agreement between said parties to be null and void and of no effect.

"That when said Frank W. B. Morris learned that said company was a fraud and had no factory site, he tendered back his stock and demanded the cancellation of said note, and upon refusal to take said stock and return said note he tendered said stock into the court for the benefit of said plaintiff and company."

From which it concluded there was no consideration for the execution of the note.

These findings were excepted to by appellant, but a careful reading of all the evidence convinces us that they are all abundantly supported thereby. Indeed, a statement of the bare ultimate facts in the conventional form of legal findings seems ill suited to the telling of the true story revealed by this evidence. The graphic language of fiction would be more appropriate to the subject. We do not have before us the articles of incorporation of this company showing the object of its organization, which probably state some lawful purpose; but from this evidence it is plain the trial court was fully justified in characterizing the company and its business as a fraud.

Appellant contends that respondents are estopped to defend against this note upon the ground of want of consideration and fraudulent representations inducing its execution in payment of the stock, because of certain statements in the printed form of order or application therefor furnished by Cunningham and addressed to the company, signed by respondent Frank W. B. Morris, at the time, which it is contended constituted the entire contract of purchase of the stock. We think, however, in view of all the facts and circumstances disclosed by the evidence, respondents were entitled to invoke this defense, which is so fully proven, notwithstanding there are statements in the signed order, embodied in paragraphs of much finer print than other portions thereof, which technically construed might be deemed an admission of facts contrary to those here proven in support of this affirmative defense. The judgment of the learned trial court is eminently just. It is affirmed.

RUDKIN, C. J., DUNBAR, CROW, and MOUNT, JJ., concur.

[Nos. 8250, 8251. Department One. December 16, 1909.]

SALLIE WEATHERALL, *Appellant*, v. ROBERT WEATHERALL
et al., *Respondents*.¹

APPEAL—DISMISSAL—RECORD—STATEMENT OF FACTS—FILING. It is not ground for the dismissal of an appeal that a proposed statement of facts, filed without service, was withdrawn, refiled, and served under an order of court, within the time for proposing the same.

SAME—STATEMENT OF FACTS—CASES TRIED AS CONSOLIDATED. Where two cases are tried together and one judgment entered, thus treating the cases as actually consolidated, but one statement of facts is necessary on appeal.

MARRIAGE—COHABITATION—PRESUMPTION. While a common law marriage is not valid in this state, cohabitation and reputation raises a rebuttable presumption of a valid ceremonial marriage.

¹Reported in 105 Pac. 822.

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MARRIAGE—COHABITATION AND REPUTATION—EVIDENCE—ADMISSIBILITY. Evidence of cohabitation between a white man and an Indian woman, and of reputation and declarations of the husband that they were married, and of the manner in which they lived together and the opinion of friends and neighbors, is admissible to raise the presumption of a ceremonial marriage, and to supplement evidence of a marriage ceremony performed by an Indian chief assuming to act as a minister.

MARRIAGE—CEREMONY—EVIDENCE — SUFFICIENCY — AUTHORITY OF MINISTER—STATUTES AS TO VALIDITY. A marriage ceremony wherein a white man and an Indian woman agreed to take each other as husband and wife, performed by an Indian chief who was a Christian of the Presbyterian faith, and who assumed to be a minister, and to have authority to unite people in marriage, is within Bal. Code, §§ 4470, 4471, providing that no particular form is necessary other than the assent to take each other as husband and wife, and that the validity thereof shall not be affected on account of any want of power or authority of such person, if the marriage is consummated with a belief on the part of either of the persons that they have been lawfully married.

WITNESSES—TRANSACTIONS WITH DECEASED—WIFE'S TESTIMONY AS TO MARRIAGE. The surviving wife, claiming an interest in lands of her deceased husband, is, under Bal. Code, § 3991, incompetent to testify as to the marriage or to any other transaction with the deceased.

Appeal from a judgment of the superior court for Thurston county, Mitchell, J., entered April 29, 1909, dismissing on the merits actions to establish a marriage and to contest a will, and to establish a resulting trust in real property. Reversed.

J. W. Robinson and R. H. Fry, for appellant.

Troy & Sturdevant and A. J. Falknor, for respondents.

Gose, J.—The appellant commenced a proceeding in the superior court of Thurston county in probate, for the purpose of establishing her marriage with H. R. Weatherall, deceased, and contesting his alleged will. Later she filed in the same court a bill in equity against the respondents, to establish a resulting trust in certain real estate. The two cases were tried, and one judgment was entered dismissing both cases. An appeal was taken from this judgment.

A motion to dismiss the appeal has been interposed, based upon two grounds, (1) because the statement of facts was filed May 2, 1909, without service, and withdrawn, refiled, and served on June 19, 1909, under an order of the court; (2) because but one statement of facts was served and filed in the two cases. The judgment was entered April 26, 1909. In support of the first ground, respondents cite *State ex rel. Royal v. Linn*, 35 Wash. 116, 76 Pac. 513. The case is not in point. It holds, construing Bal. Code, § 5058, that, where a proposed statement of facts has been filed and served and no amendments proposed within ten days, the proposed statement "shall be deemed agreed to," and shall be certified by the judge, and that he cannot thereafter permit it to be withdrawn, amended, refiled, and resettled. No good would have resulted to the respondents from a separate statement of facts in each case. The statements would necessarily have been duplicates. While the cases were not technically consolidated, they were tried together, and one judgment was entered, thus treating the cases as having been actually consolidated. The objections are technical and raise no question going to jurisdiction. The motion will be denied.

The petition in probate alleges that the petitioner and H. R. Weatherall, deceased, were married in 1879, in Thurston county, this state, and that they lived together as husband and wife until the decease of the latter. This is denied by the respondents. The appellant is an Indian woman, and the deceased was a white man. The appellant contends that there was a valid ceremonial marriage about the year 1879, and that the parties lived together thereafter, in the manner usual between husband and wife, until the death of the husband. The respondents insisted throughout the trial, and now insist, that the relation between the appellant and the deceased was not at any time one of a matrimonial cohabitation, but an illicit and meretricious cohabitation, which did not create the relation of husband and wife, and this view was adopted and made effective by the judgment below.

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James Tobin, an Indian, testified that the deceased and the appellant came to him, and that the former requested him to inform one Kettle Labatum, an Indian chief, that he came there for the purpose of having him unite them in marriage; that he interpreted the request to the chief, who said that white men, after they live with Indian women for a time, "throw them out;" that he interpreted this to the deceased, who said that he would not do that; "that he would not throw out Sallie;" that Kettle then said that he would marry them if the deceased wanted her; that he interpreted this to the deceased who said that he did want her, and that he came there to see if he, Kettle, would marry them; that Kettle then called upon the deceased and the appellant to stand together, and asked the deceased if he would take the appellant as his wife; that he then asked the appellant if she would take the deceased as her husband; that she answered "Yes;" that he then caused them to shake hands and said, "You two are married and you must be man and wife;" that thereafter they lived together. He also said, in answer to the question whether the chief was a minister, "Why, he was a preacher; no getting around that." The wife of this witness testified, that she was the daughter of the chief; that the deceased "came to see her father and told her father that he wanted to marry Sallie. Her father asked Mr. Weatherall, 'Will you live with her until you die or until she dies?' and Mr. Weatherall says, 'Yes.' Then he married them right there, made them shake hands, and Mr. Weatherall swore he would live with her as long as both lived. . . He made them raise their hands and he said a prayer for them." Other evidence was admitted and stricken and offered and denied, tending to show declarations of the deceased that the marriage ceremony was performed by a minister and that the appellant was his wife; that they lived together as husband and wife until the husband's death, and that they were regarded as husband and wife by their friends and neighbors.

The respondents rely upon the following cases in support of the judgment: *In re McLaughlin's Estate*, 4 Wash. 570, 30 Pac. 651, 16 L. R. A. 699; *Kelley v. Kitsap County*, 5 Wash. 521, 32 Pac. 554; *In re Wilbur's Estate*, 14 Wash. 242, 44 Pac. 262. These cases, as we shall see, simply hold that a common law marriage and a marriage according to Indian custom are invalid in this state. In *In re McLaughlin's Estate*, at page 585, it is said:

"In all cases, whether common law marriages are recognized or not, evidence of cohabitation and repute is admissible, as tending to show a valid marriage; holding each other out as husband and wife to the public, and continued living together in that relationship has ordinarily, if not universally, been held sufficient proof, unless contradicted, to establish it even within those states where common law marriages are not recognized. This presumption could always be rebutted, however, by showing that the parties intended their connection to be illicit, and if it was so intended at its commencement it is presumed to continue, unless evidence is produced of a change of mind."

In the *Kelley* case, at page 524, it is said:

"The testimony in this instance shows that said Michael Kelley obtained this woman by paying two or three dollars in silver to her sisters; that they lived together a short time, and that she left him, she being at the time pregnant, and that the plaintiff was the issue."

And continuing it is said: "There is no claim that any marriage ceremony was ever performed for the parties." In *In re Wilbur's Estate*, it was held that a marriage between a white man and an Indian woman, according to Indian custom, was invalid. Later expressions from this court on the same subject are contained in the following cases: *Summerville v. Summerville*, 31 Wash. 411, 72 Pac. 84; *Shank v. Wilson*, 33 Wash. 612, 74 Pac. 812; *State v. Nelson*, 39 Wash. 221, 81 Pac. 721; *McDonald v. White*, 46 Wash. 334, 89 Pac. 891; *Nelson v. Carlson*, 48 Wash. 651, 94 Pac. 477; *In re Sloan's Estate*, 50 Wash. 86, 96 Pac. 684; *Thomas v. Thomas*, 53

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Wash. 297, 101 Pac. 865. In the *Summerville* case, there was no record evidence of a marriage. The wife testified, that she saw neither a marriage license nor a marriage certificate; that her husband took her before a person whom she believed to be a clergyman, and who performed a marriage ceremony. In this case the court quoted approvingly from Vol. 1 Bishop's Marriage & Divorce, § 959, as follows:

"If a ceremony of marriage appears in evidence, it is presumed to have been rightly performed, and to have been preceded by all needful preliminaries."

Continuing:

"A valid marriage may be presumed to exist from general reputation among the acquaintances of parties that such is the fact, when that reputation is accompanied by their cohabitation, and arises from their holding themselves out to the world as occupying that relation to which the law refers when marriage is mentioned."

The court then states that there is an exception to the rule where a public offense is involved, and that in such case the presumption of innocence overthrows the presumption of marriage. In the *Shank* case, in speaking of the presumption arising from cohabitation and reputation, it is said:

"It is well established law, not necessitating the citation of authority, that the proof of continual cohabitation of a man and woman, and of a continual assertion that the marriage relation exists, and proof of such conduct as is consistent with the marriage relation, raises the presumption, in those states where the common law marriage itself is not held to be a legal marriage, that the ceremonial or legal marriage has preceded the acts mentioned."

It was further held in this case that record evidence of a ceremonial marriage did not preclude evidence of prior cohabitation and assertion of the marriage relation for the purpose of raising a presumption of a preceding ceremonial marriage. In the *McDonald* case, a marriage ceremony was performed by an Indian minister, uniting in marriage a white man and an Indian woman. There was no evidence that a

license had issued, nor that the minister was ordained. The court in this case said:

"It is evident that the parties to the marriage were endeavoring to comply with the law. . . They lived together many years after the ceremony, and held themselves out to the world, and were treated by the community, as being husband and wife. . . In view of all the surroundings, we do not think that the trial court erred in treating this as a valid marriage."

In the *Nelson* case, the rule announced in the *Summerville* and *Shank* cases is reaffirmed. To the same effect is *State v. Nelson*, 29 Wash. 221, 81 Pac. 721. In the later case, *In re Sloan's Estate*, in answer to the objection that there was no proof that a license was obtained or that the officiating officer was competent, it was said:

"The authority of the officer or clergyman performing the marriage ceremony, and all the prerequisites of a valid marriage will be presumed until the contrary is made to appear."

In the *Thomas* case, it was held that, for the purpose of sustaining a marriage and repelling the conclusion of an illicit relation, courts will seize all presumptions both of law and fact and press into service all things which can help in each particular case. The same view is announced in *Travers v. Reinhardt*, 205 U. S. 423.

We have reviewed the cases in this court for the purpose of showing that there is no real conflict between the earlier and later ones on this subject. We have seen that in the *McLaughlin* case it was stated by Judge Scott that, in the states where common law marriages are held invalid, a lawful ceremonial marriage may be presumed from cohabitation and reputation. The logic of that case has been liberally applied to the facts in the later cases to uphold the marriage relation, where the parties have lived together as husband and wife and held themselves out to the public as sustaining that relation. In such cases the law will, in favor of morality and decency, presume a legal marriage. This presumption

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is, of course, always rebuttable. Whilst language may be found in some of the earlier cases which tends to support the judgment, the uniform and unbroken current of opinion in this court, as we read the cases, has been that, while a common law marriage is invalid in this state, evidence of cohabitation and reputation is admissible for the purpose of raising the legal presumption of a prior ceremonial marriage. The cogency of the presumption will, of course, depend upon the facts of each particular case. The evidence of cohabitation and reputation, the declaration of the husband that he was married to the appellant, the manner in which they lived together, and the opinion of their friends and neighbors as to how they regarded the relation between the parties, were admissible for the two-fold purpose, (1) to raise the presumption of a prior ceremonial marriage, and (2) to supplement the evidence of the ceremonial marriage. Their conduct towards each other is equivalent in law to a continuing declaration, by each, that they were occupying the relation of husband and wife.

Our code, Bal. Code, § 4470, provides:

“A marriage solemnized before any person professing to be a minister or a priest of any religious denomination in this state, or professing to be an authorized officer thereof, is not void, nor shall the validity thereof be in any way affected on account of any want of power or authority in such person, if such marriage be consummated with a belief on the part of the persons so married, or either of them, that they have been lawfully joined in marriage. . . .”

Section 4471 provides:

“In the solemnization of marriage no particular form is required, except that the parties thereto shall assent or declare, in the presence of the minister, priest, or judicial officer solemnizing the same, and in the presence of at least two attending witnesses, that they take each other to be husband and wife.”

The evidence brings the marriage ceremony within the terms of the statute. The chief who performed the cere-

mony was a Christian of the Presbyterian faith, and assumed to have authority to unite people in marriage. Moreover, it is evident that the marriage was performed with the belief on the part of both the contracting parties that he had authority to perform the marriage ceremony. They invoked his assistance for the sole purpose of being legally married. The respondents urge that there is no evidence that a license was procured, or that the chief had authority to perform the marriage ceremony. The authority of the officiating officer, together with all other prerequisites, will be presumed in the absence of countervailing evidence, where the marriage is consummated with a belief on the part of either or both the contracting parties that they have been lawfully joined in marriage.

The evidence shows that the appellant lived with one Hall for a period of four or five years preceding her marriage with the deceased. Mrs. Gibbs, a witness for the appellant, however, testified that she was not married to Hall, and there is no evidence to the contrary.

The court correctly ruled that the appellant was incompetent to testify as to the marriage, or to any other transaction with the deceased. Bal. Code, § 3991; *Spencer v. Terrel*, 17 Wash. 514, 50 Pac. 468; *O'Connor v. Slatter*, 46 Wash. 308, 89 Pac. 885; *Nelson v. Carlson*, *supra*.

We think the learned trial court erred in striking the evidence of the marriage ceremony, and in denying the evidence of declarations of the deceased as to his marriage with the appellant, and in refusing to permit the appellant to show facts as to the cohabitation of the parties and their reputation of being husband and wife.

The judgment will be reversed, and the case remanded with directions to proceed in conformity with this opinion, not foreclosing the respondents' right to meet the appellant's case.

RUDKIN, C. J., CHADWICK, FULLERTON, and MORRIS, JJ., concur.

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Opinion Per MORRIS, J.

[No. 8261. Department One. December 16, 1909.]

I. W. BAILIE *et al.*, *Appellants*, v. W. T. PARKER *et al.*,
Respondents.¹

VENDOR AND PURCHASER—FRAUDULENT REPRESENTATIONS—EVIDENCE—SUFFICIENCY. There is sufficient evidence to make out a *prima facie* case of fraud in the sale of land, where it was represented to be tillable and suitable for irrigation, with water rights and fifty or sixty acres under cultivation, half in alfalfa, and all fenced, when in fact, none had been prepared for cultivation, no water rights obtained, and the representations were false in other respects.

Appeal from a judgment of the superior court for Spokane county, Warren, J., entered December 10, 1908, dismissing an action for damages for fraud in the sale of real property. Reversed.

Belt & Powell, for appellants.

John M. Gleeson and Joseph F. Morton, for respondents.

MORRIS, J.—Appellants brought this action to recover damages for fraudulent misrepresentations in the sale of certain lands in Oregon. At the conclusion of their case, respondents challenged the sufficiency of the testimony and moved for a dismissal, which motion was granted, and a motion for a new trial being denied, plaintiffs appeal.

Upon reviewing the record we are of the opinion that the court was in error in sustaining the challenge and dismissing the action. The evidence was to the effect that respondents represented the land as being tillable and suitable for irrigation, with water rights; that between fifty and sixty acres were under cultivation with about thirty acres in alfalfa; two sets of buildings, and all fenced; when, as a matter of fact, there was no alfalfa on the place, none of

¹Reported in 105 Pac. 834.

the land had been prepared for cultivation, no water rights had been obtained, no irrigation ditches constructed, and that in other respects the land was not as represented. With such evidence we cannot understand why a *prima facie* case had not been made out. Without citing other authority, or discussing the case further, in view of the fact that a new trial must be had, we think the case is controlled by the decision of this court in *Woody v. Benton Water Co.*, 54 Wash. 124, 102 Pac. 1054, and upon the authority of that case the judgment is reversed and the cause remanded for a new trial.

RUDKIN, C. J., GOSE, FULLERTON, and CHADWICK, JJ., concur.

[No. 8196. Department One. December 16, 1909.]

LUELLA WINGARD, *Respondent*, v. CHARLES LEO WINGARD, *Appellant*.¹

DIVORCE—CUSTODY OF CHILDREN—WELFARE OF CHILD. An order awarding the custody of a daughter fourteen years of age to the mother, upon a divorce, will not be disturbed when in harmony with the welfare of the child.

Appeal from an order of the superior court for Walla Walla county, Brents, J., entered March 17, 1909, denying a motion to vacate an order awarding the custody of a minor to her mother. Affirmed.

Cain & Hurspool, for appellant.

H. S. Blandford, for respondent.

GOSE, J.—This suit is waged between divorced parents, over the custody of their daughter, of the age of fourteen years. The trial court, after according a full hearing to the respective parties, awarded the custody to the mother. The father has appealed.

An attentive consideration of the evidence has convinced

¹Reported in 105 Pac. 833.

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Opinion Per Gose, J.

us that the judgment is in harmony with the welfare of the child. This is the controlling consideration in questions of this character. The daughter has reached an age when she should not be deprived of the society, influence, and guidance of her mother unless reasons of the gravest character demand it. Such reasons do not now exist. Neither a review of the evidence nor a statement of its general tenor would serve any useful purpose. Our conclusion is, upon all the facts, that the judgment should be affirmed, and it is so ordered.

RUDKIN, C. J., FULLERTON, CHADWICK, and MORRIS, JJ., concur.

[No. 8158. Department One. December 16, 1909.]

JAMES A. JONES, *Plaintiff*, v. B. E. PAUL *etc.*, *Respondent*.¹

CERTIORARI—WHEN LIES—VACATION OF JUDGMENT—REMEDY BY APPEAL. Certiorari does not lie to review an order vacating a default judgment; since there is an adequate, though less speedy, remedy by appeal from the final judgment.

Application for a writ of certiorari to review an order of the superior court for Pierce county, Shackleford, J., entered April 17, 1909, vacating a default judgment. Denied.

Gustave B. Aldrich, for plaintiff.

J. B. Keener, for respondent.

Gose, J.—This is an application for a writ of certiorari to review an order of the superior court vacating a default judgment. The crucial question presented is whether the writ will issue to review an interlocutory order where there is an adequate but less speedy remedy by appeal. In *Nelson v. Denny*, 26 Wash. 327, 67 Pac. 78, the court in holding that an order vacating a judgment was not an appealable one, quoted from *Freeman v. Ambrose*, 12 Wash. 1, 40 Pac. 381, as follows:

“We think it against the policy of the law to give the act

¹Reported in 105 Pac. 625.

a construction that would multiply appeals and permit litigants to bring their causes here by piecemeal, and especially so since the act itself provides that an appeal from any 'final judgment shall also bring up for review any order made in the same action, either before or after the judgment.' Laws 1898, p. 119, subd. 1, §1. The ruling complained of can be reviewed after a final judgment shall have been entered in the cause, and upon an appeal from such judgment a complete and just disposition of the cause can be made. To permit an appeal from an order of this character is to needlessly delay the progress of litigation, frequently amounting to a denial of justice, and in a vast majority of cases it would be productive merely of expense to litigants and the placing of useless and unnecessary labor upon the court."

Our code, Bal. Code, § 5741, provides that the writ of review shall be granted:

"When an inferior tribunal, board or officer, exercising judicial functions, has exceeded the jurisdiction of such tribunal, board or officer, or one acting illegally, or to correct any erroneous or void proceeding, or a proceeding not according to the course of the common law, and there is no appeal, nor in the judgment of the court, any plain, speedy and adequate remedy at law."

The logic of the *Nelson* case applies with equal force to the application for a writ of certiorari. If the final judgment is against the relator he can review, upon an appeal from that judgment, the question whether the court exceeded its jurisdiction or abused its discretion in vacating the judgment. This court has uniformly denied the writ, as well as other extraordinary writs, where there was an adequate, although less speedy, remedy by appeal. The delay and annoyance incident to an appeal has not been a controlling factor in determining whether a writ will be granted or denied. See, *State ex rel. Young v. Denney*, 34 Wash. 56, 74 Pac. 1021, and the cases there collated.

The writ will be denied.

RUDKIN, C. J., CHADWICK, FULLERTON, and MORRIS, JJ., concur.

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Opinion Per MORRIS, J.

[No. 8223. Department One. December 16, 1909.]

CHARLES H. McEVOY *et al.*, Respondents, v. ANDREW
TAYLOR *et al.*, Appellants.¹

WATER AND WATER COURSES—RIPARIAN RIGHTS—POLLUTION—REASONABLE USE. The owner of a small tract of land upon which there are springs, forming a pond about twenty feet wide by forty feet long, cannot be enjoined by a lower riparian owner from use of the same for a few geese, and horses and cattle at pasture, as the same is a reasonable use, and pollution of the stream thereby is a natural incident to proper and reasonable use thereof.

SAME—NONRIPARIAN OWNERS. One who is not a riparian owner but who diverted the waters of a spring to his own land by pipes, cannot enjoin the pollution of the waters by an upper riparian owner who had used the waters on his own lands for ten years prior to the diversion.

Appeal from a judgment of the superior court for Walla Walla county, Brents, J., entered December 30, 1908, in favor of the plaintiffs, enjoining the use and interference with the waters of a pond, after a hearing before the court. Reversed.

Dunphy, Evans & Garrecht, for appellants.

MORRIS, J.—Appellants own a small tract of land on the outskirts of Walla Walla. Springs of water rise upon the land, and the waters therefrom form a small pond about twenty feet in width and forty feet in length. From this pond the water flows in a small stream down upon and across respondents' property. The action was brought, alleging the pollution of the water by appellants in permitting their horses, cattle, and geese to use the pond so as to befoul its waters and render its use unfit for respondents. The action resulted in the court enjoining the appellants from permitting their horses, cattle, or geese from entering into and corrupting the water, so as to prevent its flow in its natural purity; commanded them to clean out the spring, restoring it to its

¹Reported in 105 Pac. 851.

natural condition, and to remove a hog pen situate near the head of one of the springs, which last spring, however, did not empty its water into the pond. From the decree so entered, defendants have appealed.

Respondents have not appeared in this court, so that we have not the benefit of a brief in their behalf. The only question involved in the appeal is the general one involved in the decree. The parties being riparian owners, their respective rights to the use of the water are to be determined by their rights as such riparian owners. These rights are now well established. Each riparian owner is entitled to a reasonable use of the waters as an incident to his ownership, and as all owners upon the same stream have the same right of reasonable use, the use of each must be consistent with the rights of others, and the right of each is qualified by the rights of others. We are speaking now of rights common and incidental to riparian ownership, without regard to, and unaffected by, any modification of grant, prescription, or prior appropriation, which oftentimes enters into and largely determines the use of water by riparian owners. In cases of this character, the question to be determined largely is, What is a reasonable use, and is the diminution and pollution of the stream other and beyond the rights accorded under a reasonable use? If the upper owner goes beyond this reasonable use and damages the lower owner, then he must answer in damages or have his unreasonable use enjoined. But if his proper and reasonable use causes damage to the lower owner, such damage flowing from the proper use of a natural right is *damnum absque injuria*.

Having determined the character of permissive use of the water by the upper owner, we will examine the evidence to ascertain whether or no appellants' use extended beyond their rights. The tract of land owned by appellants comprises seven and one-half acres. The spring and pond are enclosed, with about one-third of an acre, by a fence with an open gateway. Appellants at the time of the trial below

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owned three horses, two cows, and five geese. They had at different times had as many as six cows and six or seven horses, and for about four months in the year they have as many as twenty geese, the increase being goslings which are sold each year in the fall. The cows and geese roam around in the pasture land outside the spring enclosure. The cows come down through the open gateway to the pond to drink, and the geese at times swim upon its surface. The horses are also watered there. After leaving appellants' tract, the water flows about three hundred feet, when it reaches the point where respondents take it, using it for the laundry and bath-room, but not for drinking or culinary purposes. Respondents and witnesses testify to seeing the horses, cows, and geese in the pond; that the pond sometimes has what they describe as a "green scum" on its surface, and leaves and feathers float upon it; that the water when it reaches them has a bad odor, and in their opinion is unfit for domestic use. Other witnesses for appellants testify to drinking the water at the point of respondents' taking, and finding it sweet and clear. Others that the spring and pond were clean.

It cannot be gathered from all the evidence of respondents but that the use of the spring and pond by appellants was a natural use. They had a right to use the spring and pond to water their cattle or for their geese to swim upon, and the pollution of the water being a natural incident to a proper and reasonable use cannot be restrained nor prevented. *Gould v. Hudson River R. Co.*, 6 N. Y. 522, 552. In the case of *Helfrich v. Cantonsville Water Co.*, 74 Md. 269, 22 Atl. 72, 28 Am. St. 245, 13 L. R. A. 117, a case similar in many respects to the case before us, the court discussing the rights of the parties says:

"We must confess that the right of a man to cultivate his own fields, and to pasture his cattle on his own land, is of an original and primary character, and that it would be oppressive to interfere with the free exercise of it, except under a necessity caused by grave public considerations. The washings from cultivated fields might, and probably would, carry

soil and manure into streams of water, and make them muddy and impure. And so the habits of cattle according to their natural instincts would lead them to stand in the water and befoul the stream. But, nevertheless, the owners of the land must not lose the beneficial use of it. The inconveniences which arise from the pollution of the water by these causes must be borne by those who suffer from them. . . . So far as we can see from the record, there was nothing unreasonable or unusual in the way in which the cattle were pastured in this lot. If Helfrich had wantonly and recklessly befouled the water of the stream, or had harassed the water company or injured its business by an immoderate and excessive exercise of his acknowledged rights, he would justly have been responsible for his conduct. But nothing of this kind can be justly attributed to him. He seems to have used his pasture as all men, time out of mind, have done in like cases. We are not unmindful of the vast number of cases where persons have been enjoined from committing nuisances in running streams, and from depositing or permitting to be deposited in them noxious, deleterious, or unwholesome matter, and from any unlawful or unreasonable thing which impairs the legitimate use of the water by riparian owners. Nor have we overlooked the numerous cases where it has been held that certain kinds of manufacturing establishments have infringed the vested rights of such owners. Our opinion is placed on the distinct ground that Helfrich was using his pasture lot in a reasonable manner, and that he had a right so to use it."

A like conclusion is reached in *People v. Hulbert*, 131 Mich. 156, 91 N. W. 211, 100 Am. St. 588, 64 L. R. A. 265, where the court reviews many authorities, holding the ordinary use of the water for the home and cattle is a reasonable use, and hence a permissive use.

In *Hazeltine v. Case*, 46 Wis. 391, 32 Am. Rep. 715, it was held that the keeping of hogs enclosed in a yard upon a small running stream was a reasonable use, even though the hogs so befouled the stream that the lower proprietor could not use the water for culinary purposes. See, also, Gould, *Waters*, §§ 205, 366. We, therefore, hold that appellants' use of the spring and pond was a natural and reasonable use, and that it cannot be enjoined.

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Syllabus.

The spring which did not flow into the pond, but was likewise affected by the decree of the court, was riparian to appellants' lands, but not to respondents, it being shown that in its natural state the water from it flowed into Garrison creek, and could not reach respondents' lot unless intercepted, piped, and thus diverted, which respondents did about two years ago; while appellants' use which was enjoined had been for twelve years. Respondents, being non-riparian proprietors, could not enjoin the use against a prior riparian proprietor. When respondents appropriated this water, they appropriated what then existed, and no cause of action is open to them to change rights acquired by a prior lawful use. *Conrad v. Arrowhead Hot Springs Hotel Co.*, 103 Cal. 399, 37 Pac. 386.

We therefore hold the injunction was improperly issued, and the judgment is reversed and the action will be dismissed.

RUDKIN, C. J., GOSE, and CHADWICK, JJ., concur.

[No. 8387. Department One. December 16, 1909.]

JAMES A. MURRAY, *Appellant*, v. TERRENCE O'BRIEN,
Administrator of the Estate of John Sullivan,
Deceased, et al., Respondents, MERCANTILE
INVESTMENT COMPANY, *Intervener and*
*Respondent.*¹

MORTGAGES — FORECLOSURE — INTERVENTION — SUBROGATION. The owner of a half interest in mortgaged property, acquired after the commencement of suit to foreclose the mortgage, has a right to intervene in the foreclosure suit and make a tender with a view of being subrogated to the rights of the mortgagee against his co-owners.

SUBROGATION—NATURE AND RIGHT—PAYMENT OF MORTGAGE. The right of subrogation applies to an owner of an undivided half interest in mortgaged property who tenders the mortgage debt with

¹Reported in 105 Pac. 840.

a view of saving his interest in the property; since subrogation requires no contract or privity and he is not a mere volunteer in discharging the debt of his co-owners.

SUBROGATION — PROCEEDINGS — MORTGAGES — PAYMENT BY PART OWNER. On the principle that a court of equity having acquired jurisdiction for one purpose will retain it for all purposes, a plaintiff in a suit for the foreclosure of a mortgage cannot object to any procedure whereby the owner of a half-interest in the property may, on tendering the debt, become subrogated to the plaintiff's rights against the co-owners.

SAME. In such a case it is not a valid objection by the mortgagee to such subrogation that the co-owners are willing to pay their part of the debt, since the mortgagee owes no duty to third persons, whom the court will protect by its orders; especially where there is nothing to show that privilege of payment was denied such parties.

SAME—SATISFACTION OF MORTGAGE—EFFECT—TENDER—POWER OF COURT TO ORDER SUBROGATION. It is unnecessary for the owner of a half-interest in mortgaged property, acquired after commencement of the foreclosure suit, to begin a suit to enjoin satisfaction of the mortgage upon tender made, or to intervene in the action for the purpose of being subrogated to the rights of the mortgagee; since satisfaction of the debt would not destroy the right of subrogation, and upon payment into court, the court could enter an order recognizing the subrogation without any forfeiture of rights.

TENDER—SOURCE OF MONEY—MATERIALITY. Upon a tender of a mortgage debt, it is immaterial from what source the money comes.

MORTGAGES—TENDER—EFFECT—DISCHARGE OF LIEN—KEEPING TENDER GOOD. Tender of the amount due on a mortgage before law day, extended by construction until suit commenced, discharges the lien of the mortgage, and the tender need not be kept good by bringing it into court.

SAME—"FORECLOSURE" AND "LAW DAY." In the rule for the discharge of a mortgage by tender before law day or at any time before foreclosure and sale, "foreclosure" and "law day" are synonymous terms, and mean the "institution of the suit" as contradistinguished from the "law day" of the common law; and "law day" does not, as to a tender *inter partes*, extend to the day of sale.

SAME—DISCHARGE OF LIEN BY TENDER—TO WHOM AVAILABLE. The rule that a tender discharges the lien of a mortgage does not avail one who is seeking affirmative relief and asking the cancellation of the debt.

TENDER—CONSTRUCTION—CONDITIONS. An unconditional tender cannot be measured by two qualified tenders made immediately before on the same day.

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Citations of Counsel.

SAME—TENDER AFTER SUIT BROUGHT—PURPOSE—CONSTRUCTION—EFFECT. Where the owner of a half-interest in mortgaged property, acquired after suit for foreclosure was commenced, intervened and tendered the debt due, and asked for subrogation to the rights of the mortgagee, both in the foreclosure suit and in an independent action to enjoin cancellation of the mortgage, the tender should be considered as made in aid of the affirmative relief prayed for; and hence the same cannot be urged to secure a discharge of the mortgage lien and a consequent loss of the debt through a failure to present a claim therefor to an administrator, contrary to equity and to the relief originally sought.

TENDER—NECESSITY OF KEEPING GOOD—EQUITY. The rule at law that a tender must be kept good or paid into court does not apply in equity, as a willingness to pay may alone be sufficient; irrespective of Bal. Code, §§ 5176, 5177, providing that money may be paid into court and thus arrest interest and costs.

SAME—EFFECT IN EQUITY—ARRESTING INTEREST. An unconditional tender of the amount due on a mortgage, after pleading a willingness to pay in full, which was refused by the mortgagee in the hope of gaining some personal advantage, arrests the interest from the date of the tender.

Appeal from a judgment of the superior court for King county, Main, J., entered June 18, 1909, upon findings in favor of the defendants, after a trial on the merits before the court without a jury, in an action to foreclose a mortgage. Reversed.

Trumbull & Trumbull (Hughes, McMicken, Dovell & Ramsey, of counsel), for appellant. The intervener had no right to intervene. Bal. Code, § 4846; *Westland Pub. Co. v. Royal*, 36 Wash. 399, 78 Pac. 1096; *McNamara v. Crystal Min. Co.*, 23 Wash. 26, 62 Pac. 81. And its complaint in intervention did not state sufficient facts to entitle it to any relief. *Davis v. Flagg*, 35 N. J. Eq. 491; *Morris v. Tuthill*, 72 N. Y. 575. The mortgagee could not be compelled to assign the mortgage. *Lamb v. Montague*, 112 Mass. 352; *Butler v. Taylor*, 5 Gray 455; *Ellsworth v. Lockwood*, 42 N. Y. 89; Jones, *Mortgages* (6th ed.), § 792. The complaint states no cause of action on the theory of subrogation, since subrogation would take place by operation of law

upon payment. 1 Jones, Mortgages (6th ed.), § 874; Sheldon, Subrogation, §§ 6, 45, 173; *Lamb v. Montague*, and *Ellsworth v. Lockwood*, *supra*; *Insurance Co. of North America v. Fidelity Title & Trust Co.*, 123 Pa. St. 523, 16 Atl. 791, 10 Am. St. 546; *Forest Oil Company's Appeals*, 118 Pa. St. 138, 12 Atl. 442, 4 Am. St. 584. The rights of the parties are determined as of the time of bringing the action. *Smith v. Woodleaf*, 21 Kan. 515; *Weeks v. Baker*, 152 Mass. 20, 24 N. E. 905; *Thomas v. Seattle Brew. & Malt. Co.*, 48 Wash. 560, 94 Pac. 116, 125 Am. St. 945, 15 L. R. A. (N. S.) 1164. The intervener is not within the terms of the statute allowing intervention. 11 Ency. Plead. & Prac., 502; *Des Moines Ins. Co. v. Lent*, 75 Iowa 522, 39 N. W. 826; *Braithwaite v. Akin*, 3 N. D. 365, 56 N. W. 133; *Continental Nat. Bank v. Weems*, 69 Tex. 489, 6 S. W. 802, 5 Am. St. 85. The statute regulates the tender, and even if made on law day, unless it is kept good, only stops interest or damages. *Landis v. Saxton*, 89 Mo. 375, 1 S. W. 359; *Knollenberg v. Nixon*, 171 Mo. 445, 72 S. W. 41, 94 Am. St. 790; *Hudson Bros. Commission v. Glencoe Sand & Gravel Co.*, 140 Mo. 103, 41 S. W. 450, 62 Am. St. 722; *Eaton v. Wells*, 82 N. Y. 576. The general rule is that tender after default, not kept good, does not impair the lien of the mortgage, but only stops interest. See cases above cited and *Himmelman v. Fitzpatrick*, 50 Cal. 650; *Perre v. Castro*, 14 Cal. 519, 76 Am. Dec. 444; *Matthews v. Lindsay*, 20 Fla. 962; *Alexander v. Caldwell*, 61 Ala. 543; *Stockton v. Dundee Mfg. Co.*, 22 N. J. Eq. 56; *Shields v. Lozeur*, 34 N. J. L. 496; *Currier v. Gale*, 91 Mass. 522; *Tishmingo Sav. Inst. v. Buchanan*, 60 Miss. 496; *Lincoln Sav. Bank v. Ewing*, 80 Tenn. 598; *Rowell v. Mitchell*, 68 Me. 21; *Smith v. Kelley*, 27 Me. 237, 46 Am. Dec. 595; *Brown v. Simons*, 45 N. H. 211; *Crain v. McGoon*, 86 Ill. 431, 29 Am. Rep. 37; *Parker v. Beasley*, 116 N. C. 1, 21 S. E. 955, 33 L. R. A. 231; *Greer v. Turner*, 36 Ark. 17. Tender after suit does not discharge the lien, unless paid into court.

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Citations of Counsel.

Bailey v. Metcalf, 6 N. H. 156; *Robinson v. Leavitt*, 7 N. H. 73; *Snyder v. Quarton*, 47 Mich. 211, 10 N. W. 204; *Roberts v. White*, 146 Mass. 256, 15 N. E. 568; *Whiteman v. Perkins*, 56 Neb. 181, 76 N. W. 547; *Daughdrill v. Sweeney*, 41 Ala. 310; *Ireland v. Montgomery*, 34 Ind. 174; *Levan v. Sternfield*, 55 N. J. L. 41, 25 Atl. 854. The tender was bad because not made for the purpose of paying the debt. 28 Am. & Eng. Ency. Law (2d ed.), 4; Hunt, Tender, §§ 1, 239, 256; 1 Jones, Mortgages (6th ed.), § 900; *Glos v. Goodrich*, 175 Ill. 20, 51 N. E. 643; *Potts v. Plaisted*, 30 Mich. 148; *Proctor v. Robinson*, 35 Mich. 284. To destroy the lien of an incumbrance there must be an absolute tender that will discharge the debt. 27 Cyc. 1406; Hunt, Tender, § 256; *Frost v. Yonkers Savings Bank*, 70 N. Y. 553, 26 Am. Rep. 627; *Tuthill v. Morris*, 81 N. Y. 94; *Werner v. Tuch*, 127 N. Y. 217, 27 N. E. 845, 24 Am. St. 443; *Lumsden v. Manson*, 96 Me. 357, 52 Atl. 783. Averment of *tout temps prist* and payment into court is essential to a plea of tender that operates to discharge the debt. 1 Jones, Mortgages (6th ed.), § 893; *Giles v. Hartis*, 1 Raym. (K. B.) 254; *Hume v. Peploe*, 8 East 168; *Kortright v. Cady*, 21 N. Y. 343, 78 Am. Dec. 145. A tender for the purpose of assignment and subrogation is a conditional one that will not discharge the lien. See cases above cited and 1 Jones, Mortgages, § 900; 2 Jones, Mortgages, § 1088; 27 Cyc. 1406; *Post v. Springsted*, 49 Mich. 90, 13 N. W. 370; *Dodge v. Brewer*, 31 Mich. 227; *Waldron v. Murphy*, 40 Mich. 668; *Ivall v. Willis*, 17 Wash. 645, 50 Pac. 467; *Thomas v. Seattle Brewing & Malting Co.*, 48 Wash. 560, 94 Pac. 116, 125 Am. St. 945, 15 L. R. A. (N. S.) 1164; *Noyes v. Wyckoff*, 114 N. Y. 204, 21 N. E. 158; *Beardsley v. Beardsley*, 86 Fed. 16; *Lilienthal v. McCormick*, 117 Fed. 89; *Union Mut. Life Ins. Co. v. Union Mills Plaster Co.*, 37 Fed. 286; *Selby v. Hurd*, 51 Mich. 1, 16 N. W. 180; *Day v. Strong*, 29 Hun 505; *Storey v. Knewson*, 55 Ind. 397; *Loring v. Cooke*, 3 Pick. 48; *Wendell v. New Hamp-*

shire Bank, 9 N. H. 404; *Forest Oil Company's Appeals*, 118 Pa. St. 138, 12 Atl. 442, 4 Am. St. 584; *Sanford v. Bulkley*, 30 Conn. 344. The evidence failed to show the capacity of the intervener to sue; the certificate that articles had been filed did not show its incorporation. *Spokane & Idaho Lumber Co. v. Loy*, 21 Wash. 501, 58 Pac. 672, 60 Pac. 1119; *Evans & Riehl v. Labaddie*, 10 Mo. 425; *Smith v. Rich*, 37 Mich. 549; 1 Greenleaf, Evidence, § 4398. The intervener was not in a position to perform the contract by tender and so discharge the lien, but only to redeem, which must be by actual payment. Hunt, Tender, § 331; Jones, Mortgages (6th ed.), § 895; *Harris v. Jex*, 66 Barb. 232; *Noyes v. Wyckoff*, 114 N. Y. 204, 21 N. E. 158; *Gibson v. Lyon*, 115 U. S. 439, 6 Sup. Ct. 129, 29 L. Ed. 440; *Rowell v. Jewett*, 73 Me. 365. The administrator was the only person qualified to make such a tender. 28 Am. & Eng. Ency. Law, pp. 34, 35; Hunt, Tender, § 330. The tender must be kept good. Hunt, Tender, § 349; 28 Am. & Eng. Ency. Law (2d ed.), 20; 1 Jones, Mortgages (6th ed.), §§ 891, 892, 893. At common law it could not be made after law day. 28 Am. & Eng. Ency. Law, 21; Hunt, Tender, § 306; *Levan v. Sternfield*, *supra*; *Smith v. Woodleaf*, 21 Kan. 515; *Murray v. Windley*, 29 N. C. 201, 47 Am. Dec. 324; *Braumann v. Vanderpoel*, 26 Misc. (N. Y.) 786; *Coghlan v. South Carolina R. Co.*, 32 Fed. 316. After action, tender can only be made under a statute authorizing it. Bal. Code, § 5177; Hunt, Tender, § 307; Wiltsie, Mortgage Foreclosure, § 255; *Snyder v. Quarton*, *supra*; *Kelly v. West*, 36 N. Y. Super. Ct. 304; *Sweetland v. Tuthill*, 54 Ill. 215; *Call v. Lothrop*, 39 Me. 434; *Astor v. Palache*, 49 How. Pr. 231; *Bartow v. Cleveland*, 16 How. Pr. 364; *Thurston v. Marsh*, 14 How. Pr. 572; *New York Fire and Marine Ins. Co. v. Burrell*, 9 How. Pr. 398.

James B. Howe, for respondent intervener, contended, among other things, that the intervener was entitled, upon

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Opinion Per CHADWICK, J.

paying the mortgage, to have the mortgage kept alive so as to secure repayment of half from its cotenants. Jones, *Mortgages* (4th ed.), p. 49, § 1089; Sheldon, *Subrogation*, § 173; 27 *Am. & Eng. Ency. Law* (2d ed.), pp. 227, 235; 27 *Cycs. of Law and Procedure*, p. 1436; Pomeroy, *Equity* (3d ed.), 792, 798, 799, 1112, 1211; Beach, *Modern Equity Jurisprudence*, §§ 802, 804; *Parsons v. Urie*, 104 Md. 238, 64 Atl. 927, 8 L. R. A. (N. S.) 559, 10 *Am. & Eng. Ann. Cases*, 280; *Ohmer v. Boyer*, 89 Ala. 273, 7 South. 663; *Pease v. Egan*, 131 N. Y. 262, 30 N. E. 102; *Hamilton v. Dobbs*, 19 N. J. Eq. 227; *Twombly v. Cassidy*, 82 N. Y. 155, 157; *Cole v. Malcolm*, 66 N. Y. 363; *Johnson v. Zink*, 51 N. Y. 333-337; *Kinkead v. Ryan*, 65 N. J. Eq. 726, 55 Atl. 730; *Weidner v. Thompson*, 69 Iowa 36, 28 N. W. 422; *Chase Nat. Bank of New York v. Hastings*, 20 Wash. 433, 55 Pac. 574; *Knoblauch v. Foglesong*, 37 Minn. 320, 33 N. W. 865. A person making a tender always has the right to state his position. *Greenwood v. Sutcliffe*, 1 Ch. Div. (L. R. 1892) 1; *Scott v. Uxbridge etc. R.*, 1 C. P. (L. R.) 596; *Halpin v. Phenix Co.*, 118 N. Y. 165, 23 N. E. 482; *Parsons v. Urie*, *supra*. It was not necessary to keep the tender good. *Moore v. Norman*, 43 Minn. 428, 45 N. W. 857, 19 *Am. St.* 247; *Kortright v. Cady*, 21 N. Y. 343, 78 *Am. Dec.* 145; *Moynahan v. Moore*, 9 Mich. 8; 22 *Central Law Journal*, pp. 389-392, par. 10. Having refused the payment, the mortgagee, by his own folly, lost his lien. *Mitchell v. Roberts*, 17 Fed. 776; *Moore v. Norman* and *Kortright v. Cady*, *supra*; *Helphrey v. Strobach*, 13 Wash. 128, 42 Pac. 537; *Thomas v. Seattle Brewing & Malting Co.*, 48 Wash. 560, 94 Pac. 116, 125 *Am. St.* 945, 15 L. R. A. (N. S.) 1164; *Andrews v. Hoeslich*, 47 Wash. 220, 91 Pac. 772, 18 L. R. A. (N. S.) 1273; *Lyon's Appeal*, 61 Pa. St. 15.

CHADWICK, J.—This appeal involves only matters in controversy between plaintiff and the Mercantile Investment

Company, intervener. No reference will be made to other parties.

On the 22d day of April, 1897, one John Sullivan made, executed, and delivered, to the United States Mortgage & Trust Company of New York, a certain note for the sum of \$75,000. This note was secured by a mortgage of even date, covering lots 4 and 5, in the addition to the city of Seattle platted by Carson D. Boren and Arthur A. Denny. On the 26th day of September, 1900, John Sullivan died in King county, and the defendant Terrence O'Brien was thereafter appointed administrator of his estate. The estate being without present funds to meet the note and mortgage on the due date, the administrator, acting under the order and direction of the court, obtained an extension of the mortgage until the first day of May, 1907. Further extensions were made, so that the note has been at all times a live demand and the mortgage a subsisting lien upon the property charged. On the 30th day of April, 1906, the United States Mortgage & Trust Company, in consideration of the then present worth of the note and mortgage and a bonus of \$500, assigned the securities to James A. Murray, the plaintiff, and he has been at all times since, and is now, the owner and holder thereof. Sullivan in his lifetime had reduced the principal indebtedness in the sum of \$15,000, so that on the 20th day of April, 1908, the date upon which this action was begun, there was due the principal sum of \$60,000, with interest from April 1, and \$1,500 being the interest from November 1, 1907, to April 1, 1908. The latter amount was evidenced by a promissory note executed by the administrator under the order and direction of the court. Plaintiff asked that the property be sold in accordance with the usual forms in such cases.

On March 23, 1909, the Mercantile Investment Company asked leave to intervene. Its petition was granted by the court. Its complaint in intervention sets up, among other things, that ever since the 5th day of December, 1908, it

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has been, and is now, a corporation duly organized under the laws of the state of Washington, and is authorized to purchase, hold, acquire, sell, and dispose of real and personal property. After reciting the death of Sullivan and the consequent probate proceedings, the execution of the note and mortgage, and plaintiff's claim to be the owner and holder thereof, it is alleged that, ever since the 4th day of January, 1909, it has been the owner of an undivided interest in the property, and that the other interest, being one-half thereof, is owned by Corwin S. Shank and wife and Edward Corcoran and Charles P. O'Neill and wife; that plaintiff had refused to grant an extension of time for the payment of the note and mortgage, or to assign his securities without recourse or otherwise; that it was ready, able, and willing to take up the mortgage, and to pay to plaintiff the principal, interest, costs, and attorney's fees; that the amount thereof had been furnished by attorneys for plaintiff; that it was willing to pay the same if the note and mortgage was assigned to it without recourse against plaintiff, or if, upon its making such payment, it be subrogated to the rights of plaintiff in the note and mortgage and in the foreclosure suit. Intervener further alleged that its co-owners were unable to pay the one-half of the amount then due, and that plaintiff, with intent to embarrass and defeat the right of the intervener, had threatened to dismiss his foreclosure suit and satisfy the lien of his mortgage and the debt secured thereby, if it paid the whole thereof.

On the 20th day of March, 1909, the intervener had begun an independent action against plaintiff, setting up in substance the same matters which are recited in its petition for intervention, and praying for an order enjoining and restraining plaintiff and his attorneys from satisfying the mortgage or dismissing the foreclosure proceeding in the event of payment by the intervener. After formal proceedings had, an order was made by the court, restraining plaintiff and his attorneys of record, and all other agents and

attorneys then employed or thereafter to be employed by him, from satisfying the note and mortgage and from dismissing the foreclosure suit in case a tender of the amount due was made by the intervener, which the order recited it was about to do. Accordingly, on the 25th day of March, 1909, the intervener tendered plaintiff's attorneys, at their office in Seattle, the full sum of \$68,654.67, being the full amount of principal, interest, costs, and attorney's fees then due upon the mortgage. In this tender the intervener said:

"The Mercantile Investment Company has instituted suit against you in the superior court of the state of Washington for King county, and seeks to be subrogated to all of the rights of James A. Murray under the notes and mortgage mentioned in the above entitled suit, and also in the above entitled suit. The Mercantile Investment Company has also intervened in the above entitled suit, and in its complaint in intervention also seeks to be subrogated to all of the rights of James A. Murray under such notes and mortgage and in the above entitled suit. This tender is made for the purpose of protecting the title of the Mercantile Investment Company in the property described in your complaint in the foreclosure suit and to obtain subrogation by the Mercantile Investment Company to all of the rights of said James A. Murray."

Upon the written offer of tender, attorneys for plaintiff indorsed over their signature the following: "Said tender is refused for the reason that it is not made for the purpose of paying and discharging said mortgage." Thereupon a tender was made, in all respects similar to the first, omitting only the last sentence. This offer was also acknowledged, and upon the writing the attorneys indorsed the following: "The above refused for the purpose set forth in the notice." A third notice of tender was then written out, in words and figures following:

"The Mercantile Investment Company now makes you a third tender of the amount mentioned in the previous tenders this day made, being the full amount of the notes and mortgage, principal, interest, costs and attorney's fees. The Mercantile Investment Company is the owner of an undivided

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half interest in the property described in the mortgage; is not personally liable for the amount or any part thereof, and now tenders you the above amount without any qualification, and requests you to accept such tender."

Upon this offer, the attorneys wrote over their signature the one word "Refused." Following these tenders, the intervener obtained leave to, and did, file an amended complaint in the intervention, in which, in addition to the allegations contained in its first complaint, it set up the several tenders to which we have alluded, and asked that, because of the refusal to accept them or any of them, the court enter a decree holding that the lien of plaintiff's mortgage be cancelled, and further, that the court decree the debt to be discharged, for the reason that there having been no formal presentation of the debt to the administrator of the Sullivan estate, the lien being lost, the debt was barred by the statute of nonclaim. Bal. Code, § 6228.

We have endeavored to epitomize the record so as to point out only the particular facts which moved the trial court to enter its decree in favor of the intervener. Appellant suggests a number of reasons why the decree of the court should not be sustained; among others, that the intervener is not entitled to intervene or to any standing as a party; that the facts set up by it are insufficient to state a cause for intervention; that being the owner of one-half of the property, it cannot make a valid tender; that no valid tender was made; that a tender made out of court during the pendency of an action does not discharge the lien of a mortgage, and that, in any event, the court erred in denying his right to recover the debt from the estate of John Sullivan.

The first several grounds upon which appellant stands are without merit. The pleadings and the proofs show that respondent has a valid and subsisting interest in the property, and its right to protect that interest in any manner or by any method sanctioned by the law cannot be questioned. The right of subrogation under the better rule applies in cases

where a party who has an interest in the property and who does not stand as a mere volunteer pays a debt owing in whole or in part by another, to protect his own rights or to save his own property. The remedy is no longer limited to sureties and quasi sureties, but is freely applied by courts of equity in all cases where good conscience and equity dictate that a debt paid by one under any sort of legal coercion ought to be paid by another. *Arnold v. Green*, 116 N. Y. 566, 23 N. E. 1; *Parsons v. Urie*, 10 Am. & Eng. Ann. Cases 280 [104 Md. 238, 64 Atl. 927, 8 L. R. A. (N. S.) 559]; Pomeroy, Equity Jurisp., §§ 798, 799; *In re Bruce*, 158 Fed. 123; Beach, Modern Equity, Jurisp., 802-804; *Twombly v. Cassidy*, 82 N. Y. 155; *Kinkead v. Ryan*, 65 N. J. Eq. 726, 55 Atl. 730.

In *Cottrell's Appeal*, 23 Penn. 294, the court said:

"Subrogation is founded on principles of equity and benevolence, and may be decreed where no contract or privity of any kind exists between the parties. Wherever one not a mere volunteer discharges the debt of another, he is entitled to all the remedies which the creditor possessed against the debtor."

Chief Justice Marshall said, in *Lidderdale v. Robertson*, *Adm'r*, 159 Fed. Cases No. 8,337:

"When a purchaser has paid money for which others were responsible, the equitable claim which such payment gives him on those who were so responsible, shall be clothed with the legal garb with which the contract he has discharged was invested, and he shall be substituted, to every equitable intent and purpose, in the place of the creditor whose claim he has discharged."

Under these rules respondent had a right to invoke the aid of the court, and so long as appellant was not asked to take less than the burden of his bond, he cannot complain or question the procedure when the court is acting within its jurisdiction. The interest creates the right, and puts in motion the maxim that a court of equity having acquired jurisdic-

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tion of the property will do complete justice as between the parties interested therein.

The reasons assigned by appellant for refusing the relief sought by respondent are fanciful rather than real. It is hinted, rather than openly asserted, that it was manifest to him that respondent was undertaking to gain an advantage over its co-owners, and if he had met the demands of respondent, under the orders of the court, some damage or prejudice would have resulted to them. Testimony is also cited showing that the co-owners were willing to pay their share of the debt. It is enough to say that the law puts upon appellant no duty to protect others. Reason and experience alike teach us that the courts may be relied upon to apply those general rules of equity ample in all cases to protect the rights of all who invoke them. In this case there is nothing to indicate any outrage upon, or attempted infringement of, the rights of the co-owners; certainly nothing that would warrant the interposition of appellant in their behalf. As for their willingness to pay their share of the debt, the answer is that there is nothing in the record to show that that privilege was, or is now, denied them.

On the other hand, we think it was entirely unnecessary for the respondent to approach an attempted settlement of this case in the manner in which it did. It might and should have relied upon the court whose jurisdiction it had also invoked. Respondent might have paid the money into court without the formal declarations of tender, and the court would have been warranted in making such orders as might be necessary for its protection. A satisfaction of the debt by appellant would not have killed the obligation or worked a forfeiture of its rights. The court had jurisdiction of the property, with power to enter an order recognizing the subrogation, for it is not created by the order, but follows as the legal consequence of the acts of the parties. *Look v. Horn*, 97 Me. 283, 54 Atl. 725; *Shaffer v. McClos-*

key, 101 Cal. 576, 36 Pac. 196; Pomeroy, Equity, 1211 *et seq.*; Pomeroy, Equitable Remedies, 921.

The point is also made that the pleadings and the tender show that they were made in behalf of another, or others who had been induced to loan the amount then due appellant, and might therefore be ignored for that reason. What we have already said disposes of this contention. Where, and upon what terms, respondent got the money to tender is of no concern to appellant. The law does not give him the right to reject an offer because he objects to the source from which the money comes. *Eslow v. Mitchell*, 26 Mich. 500.

Being of the opinion that the intervener has a right to maintain its standing in court, we now come to the main issue. The trial court was controlled in its judgment by the case of *Thomas v. Seattle Brewing & Malting Co.*, 48 Wash. 560, 94 Pac. 116, wherein the court held that a tender of the amount due on a mortgage on law day, which by construction has been extended to any time before suit brought, discharged the lien of the mortgage, and that having been so made, the tender need not be kept good by bringing the money into court. We are satisfied with that decision and, unless the contention of the appellant that action having been begun the lien of the mortgage cannot be discharged by a tender made out of court is well founded, the judgment of the lower court must be affirmed. In justice to the trial court we feel bound to say that the decree rendered by it is sustained by the leading case of *Kortright v. Cady*, 21 N. Y. 343, 78 Am. Dec. 145, and other cases upon which the *Thomas* case is made to rest. But a reexamination of that case, and of the other cases referred to in the *Thomas* decision, and those cited and relied upon by the respondent, convinces us that the reason for the rule ceases when an action is instituted to recover the debt, and that it should be given no application except in those cases where at common law a party was entitled to a discharge of a lien upon property by payment or tender of payment *inter partes*, before or upon law day.

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From the first the courts have been fertile in their reasons for refusing to extend the doctrine here invoked to cases where questions other than the mere payment of money were involved. In all the cases cited by respondent to sustain the judgment of the lower court, it appears that the primary purpose of the tender was to discharge the debt. But in this case it was not entirely so. In *Kortright v. Cady* the law was exhausted by the learned judge who wrote the opinion. It was there held that the law day of the common law should be held to be, considering the changed character of the mortgage, any day before foreclosure and sale. Accepting the rule that the tender will be effectual to discharge the lien if made at any time before foreclosure, it becomes material to inquire the meaning of that term; whether it means the commencement of an action, or a final decree of foreclosure and sale. Considering the reasons upon which the rule of discharge by tender rests; that is, that the law day continued after the due date of an obligation and until action brought, and that a lien can be defeated by a tender made within that time, it would seem to follow, as of course, that "foreclosure" and "law day" are synonymous terms, in the sense that it is a time when the mortgagor declares a default and submits his cause to a court of competent jurisdiction. The word "foreclosure," as it is used in the authorities bearing on this question, must be taken in that meaning which is common and generally accepted by the laity as well as the bar; that is, the institution of a suit, or the "law day" as contradistinguished from the "law day" of the common law. The logic of the decisions is that a lien should be discharged by tender only when made before action brought, and that thereafter it ought to be tendered in court or, if made after the writ has issued, it should be at least kept good by the plea *tout temps prist*.

In speaking of the subject of tender generally, it is said in *Coghan v. South Carolina R. Co.*, 32 Fed. 316:

"But when an action has already been commenced and is pending, if the defendant be disposed to admit the demand in

part, it is not only necessary that he should offer to pay the amount admitted in the same way as the tender before suit should be made, but he must go further, and either pay the sum admitted into court, or, at the least, offer to submit to a judgment for that sum."

In the case of *Whittaker v. Belvidere Roller-Mill Co.*, 55 N. J. Eq. 674, 38 Atl. 289, a case somewhat similar to the one at bar, it was held that, when a tender is made after suit is begun and is then urged as a defense, the money must be paid into court. In *Weeks v. Baker*, 152 Mass. 20, from which quotation is made in the *Thomas* case, the court said: "The rights of a party to an action are ordinarily to be determined as of the time of bringing the suit." We make this distinction between the case of *Kortright v. Cady* and the rule as we believe it should be. The logic of the *Kortright* case is that the law day continued from the due date of the obligation to the final decree of foreclosure and sale; whereas we hold that the law day within which a lien may be discharged by tender *inter partes*, continues only to the time of the issuance of the writ or, under the code practice, until the commencement of the action.

Because of the unusual importance of this case we feel warranted in going further and calling attention to another limitation upon the rights of a mortgagor, or one claiming under him, to discharge the lien of a mortgage by the tender of the mortgage debt. Although the rule as contended for was originally declared in New York, it has been repeatedly held, even in that state, that it will not avail one who is seeking affirmative relief. *Tuthill v. Morris*, 81 N. Y. 94; *Becker v. Boon*, 61 N. Y. 317; *Halpin v. Phenix Ins. Co.*, 118 N. Y. 165, 23 N. E. 482. Also, *Landis v. Saxton*, 89 Mo. 375, 1 S. W. 359. While we cannot indorse all of the reasons upon which some of the foregoing cases are made to rest, they are pertinent at least to show the disposition of the courts to evade the full rigor of the rule as laid down in the *Kortright* case.

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Counsel for the respondent rightfully contends that his last tender cannot be measured by the two qualified or conditional tenders immediately preceding it, but the law day having been declared by the institution of the action to foreclose the mortgage in which respondent had appeared as a party, its tender can, and should in the interest of that equity which shuns the suggestion of a forfeiture, be measured by the prayer of its complaint in the independent action as well as the original petition for intervention. When so considered, it requires no far reach of the imagination to say that it was made in aid of the affirmative relief there sought, and as a basis for the filing of the amended petition in intervention in which a cancellation of the debt was asked and obtained by order of the court. In other words, respondent now asks that, since the substance (the mortgage) has been annihilated, the cloud (the record and the debt) which overshadows the title be removed. It seeks to turn a shield of defense into a weapon of offense. We feel sure that no cases will be found which carry the rule of tender and discharge of a mortgage lien to this extent. It is not equity. Orderly procedure, as well as the assurance that the rights of litigants will be protected to their fullest extent, alike require that those who submit their causes to the courts should not go beyond the forum to establish their own case or to destroy that of their adversary.

It does not follow from what we have said in this opinion that respondent did not have the right to tender the amount of the debt, and thereby secure such other advantages as may come to it under the accepted rules of law and equity. While at law the rule that a tender must be kept good by payment in court is well-nigh universal, it is not so in equity. A willingness to pay may be sufficient. Bal. Code, §§ 5176 and 5177, provides that money may be paid into court and thus arrest interest and costs. But independent of these statutes, courts will apply the rules of equity when it is necessary to do equal justice between the parties. In the following cases the equities were such that the benefit of a tender was not lost

by a failure to pay the amount in court. *Whelan v. Reilly*, 61 Mo. 565; *Parker v. Beasley*, 116 N. C. 1, 21 S. E. 955, 33 L. R. A. 231; *Hill v. Carter*, 101 Mich. 158, 59 N. W. 413; *Mankel v. Belcamper*, 84 Wis. 218, 54 N. W. 500.

Appellant is here seeking equity. He must do equity. Remembering that respondent has gone into court averring its willingness to pay all that was due appellant, which was followed by an unconditional tender and appellant's unwarranted refusal to accept it, apparently hoping to gain some personal advantage over respondent, it would seem that in equity he should not claim anything for the use of the money. The law of tender is as much for the benefit of the creditor as the debtor. The creditor cannot refuse a tender believing it to be to his advantage to do so, and thereafter insist in equity that an unqualified tender has not been made good. Under such conditions, willingness to pay is all that the law requires. The plea of willingness being in the record, we hold that appellant is estopped to claim interest from the date of the tender. In the case of *Cheney v. Bilby*, 74 Fed. 52, where similar equities were involved, and many relevant cases are cited, Judge Caldwell said:

"Upon the soundest principles of equity and fair dealing, Cheney is estopped, on the facts of this case, from claiming interest on the notes after tender of payment. . . . When he refused payment of the principal of the notes, and, in the hope of winning a great stake, asserted a conscienceless forfeiture, which he could not maintain, even in a court of law, he put the interest on the money tendered to the hazard. He chanced it, and lost."

The case is reversed, with instructions to the lower court to enter a judgment and decree of foreclosure for the sum of \$68,654.67, unless such sum be theretofore paid by respondent to appellant, in which event the court will make such order as will protect the equities of all parties to the suit.

RUDKIN, C. J., and GOSE, J., concur.

FULLERTON, J., concurs in the result.

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MORRIS, J. (concurring).—John Sullivan, who made the note and executed the mortgage in controversy, is dead. Such note was never presented as a claim against his estate, and is now barred by the statute. There is none against whom this debt can be enforced as a personal, binding obligation. So that to hold with the court below means a decree of a court of equity wiping out an indebtedness of nearly \$70,000, upon an interpretation of the law which heretofore, so far as I have been able to gather from the books, has been applied only to the extent of destroying the lien of the security, but leaving the debt remaining as an enforceable obligation. Tender has never been held to be payment, yet to hold with respondent here means to so construe tender, as applied to mortgages, to make it in effect payment. I can find neither equity nor good conscience in such a rule. If, as in the cases cited in support of respondent's position, the debt still remained and could be enforced as a personal obligation, so that the creditor would not lose his right to seek the payment of his debt, either in this proceeding or in a separate action at law, and the only effect of the tender and its refusal was to destroy the lien given as security for the payment of the debt, I could readily subscribe to the doctrine of *Kortright v. Cady*. In such a case the rule there announced is an equitable one, its logic irresistible, its law uncontrovertible; it is the only result of premises always admitted to be true; that the mortgagor has the same right after as before a default to pay his debt and relieve his land from an incumbrance; and that payment being actually made, the lien thereby becomes extinct. Based upon these two legal principles, Comstock, C. J., in his opinion in the *Kortright* case, adds:

"We have, then, only to apply an admitted principle in the law of tender, which is, that tender is equivalent to payment as to all things which are incidental and accessorial to the debt. The creditor, by refusing to accept, does not forfeit his right to the very thing tendered, but he does lose all collateral benefits or securities."

Davies, J., in his opinion in the same case reasons it out that:

"It has never occurred to any judge to argue that a pawnee was in great peril, and in danger of losing the benefit of his pawn, by the enforcement of the well settled rule, that a tender of the amount of the loan and interest, and refusal, extinguished the lien on the pawn. Littleton well says, that it shall be accounted a man's own folly that he refused the money when a lawful tender of it was made to him. The only effect upon the rights of the mortgagee is, that the land or thing pledged is released from the lien, but the debt remaineth."

The reason of the rule, then, as given in *Kortright v. Cady*, is that it is only the incidental, the accessorial, thing that is lost by the refusal to accept the tender; not that there was danger "of losing the benefit of the pawn," but only the lien on the pawn. While if we apply the rule here, not only the incidental and accessorial thing is extinguished, but the thing itself is in effect extinguished. Not only the lien on the pawn is lost, but the danger, which "it has never occurred to any judge to argue," has come to the appellant; he has not only found himself in peril of loss, but he has lost the "benefit of his pawn." What, then, was intended as an equitable rule and one of good conscience, would, if extended to cases where not only the security but the debt itself was lost, become a most inequitable rule and one of oppression. I am willing to subscribe to the rule, then, in cases where the debt remains and can still be enforced as a personal obligation. I am not willing to subscribe to it where the personal obligation of the debt has been lost and the tender would take effect, not only as destroying the lien, but as likewise destroying all claim and right of the creditor to the debt itself.

This has appeared to me to be the equitable solution of the rule, and for these reasons I concur in the result.

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Statement of Case.

[No. 8064. Department One. December 17, 1909.]

THE STATE OF WASHINGTON, *Respondent* v. MATTHEW
GAASCH *et al.*, *Appellants*.¹

GAMING—KEEPING GAMBLING RESORT—INFORMATION—SUFFICIENCY. An information charging that the defendants did conduct and carry on a gambling game with cards in a building where persons resort for that purpose is insufficient to charge a felony under Laws 1903, p. 63, making it a felony for "owners, proprietors, employees, or assistants" to open or conduct gambling games in such places; the statute being aimed at the keeping of gambling resorts.

SAME—KEEPING RESORT—STATUTES—CONSTRUCTION. The statute making it a felony for owners, proprietors, employees, etc., to conduct gambling games in a gambling resort "in any manner whatsoever" does not amplify the intent of the law (which was aimed at keepers of resorts) so as to include those who play at the game.

SAME—GAMBLING AND KEEPING RESORTS—STATUTES—REPEAL. Laws of 1903, p. 63, making it a felony to keep a gambling resort, does not repeal Bal. Code, § 7260, making gambling for gain a misdemeanor.

INDICTMENT AND INFORMATION—LESSER OFFENSE—CONVICTION—IMPROPER SENTENCE—APPEAL—REMAND. A verdict of guilty upon an information intended to charge the felony of keeping a gambling resort, but only stating facts sufficient to charge the misdemeanor of gambling for gain, is a sufficient conviction of the latter offense; and upon reversing a sentence for the felony, the trial court will be directed to enter the proper sentence for the misdemeanor.

NEW TRIAL—NEWLY DISCOVERED EVIDENCE. A new trial for newly discovered evidence is properly refused where the evidence merely tended in a slight degree to impeach the evidence of the prosecuting witness.

Appeal from a judgment of the superior court for Cow-litz county, McCredie, J., entered January 5, 1909, upon a trial and conviction of the crime of conducting a gambling game. Modified.

J. N. Percy and *A. H. Imus*, for appellants.

B. L. Hubbell and *John F. Dufur*, for respondent.

¹Reported in 105 Pac. 817.

CHADWICK, J.—Defendants, Matthew Gaasch and Joseph Stock, were found guilty as charged upon an information drawn under the gambling law of 1903. The charging part of the information is as follows:

“They, the said Edward Bush, J. M. Bush, Joseph Stock and Matthew Gaasch, in the county of Cowlitz and state of Washington, on the 16th day of June, 1908, then and there being, did then and there conduct and carry on a gambling game played with cards, to wit: the game commonly known as poker, the said game being played for money, checks, credits and other things of value, in a building used for a saloon and lodging house purposes where persons resort for the purpose of playing, dealing and operating such gambling games; contrary to the form of the statute,” etc.

The sufficiency of the information is called in question. It will be seen that the information does not charge defendants either as owners, proprietors, employees, or assistants, or that they had, in any manner such as is made penal by the felony statute, anything to do with the game. As stated in *State v. Preston*, 49 Wash. 298, 95 Pac. 82, and *State v. Burns*, 54 Wash. 113, 102 Pac. 886, the object of the felony statute was to suppress gambling resorts and to punish those who maintained them. Hence, considering the purpose of the law as well as its letter, to sustain a conviction for a felony there must have been some charge of proprietorship. It is not sufficient to say that the one charged merely played or sat in the game, but the information should allege his relation as owner, proprietor, employee, or as assistant to one who sustains a proscribed relation to the game. The authorities sustain this view. *State v. Dennison*, 60 Neb. 157, 82 N. W. 383; *Braxele v. State*, 86 Miss. 286, 38 South. 314.

In the syllabus to *United States v. McCormick*, Fed. Cases, No. 15,663, the following apt statement of the rule of pleading in such cases may be found:

“Where a statute inflicts a penalty upon persons of a

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certain description only, it is necessary, in an indictment upon that statute, to aver all the facts necessary to show that the defendant was a person of that description at the time of committing the act."

The state contends that the words "in any manner whatever," as used in the statute, are sufficient to sustain the information. These words must be measured by the words they qualify, and cannot be relied upon to amplify the manifest intent of the law which has been recognized and declared in at least two cases decided by this court. Although the information is insufficient to charge a crime under the felony statute, it does charge a crime under the misdemeanor statute.

In *State v. Preston, supra*, it was held that Bal. Code, § 7260 was not repealed by the act of 1908. The object of this law was there declared to be to prevent gambling for gain, and that therefore the allegations of proprietorship were not essential. It was also held that, where a felony was charged, the court might submit the misdemeanor to the jury as an included crime. This was done in this case under proper instructions. Under the rule of the *Preston* case, we are of the opinion that the verdict of guilty carries with it a conviction under § 7260, and that, instead of the trial court sentencing appellants to the penitentiary, judgment should have been rendered holding them guilty of a misdemeanor.

It is further urged that a new trial should have been granted because of newly discovered evidence. The affidavit in support of this contention affords nothing more than evidence tending to impeach in some slight degree the testimony of the prosecuting witness. It was properly rejected by the trial court. It may have been true, and still there was evidence to convict. *State v. Beeman*, 51 Wash. 557, 99 Pac. 756.

This cause is remanded with instructions to the lower court

to vacate its former judgment and to enter a judgment under Bal. Code, § 7260, and to give sentence accordingly.

RUDKIN, C. J., FULLERTON, MORRIS, and GOSE, JJ., concur.

[No. 8184. Department One. December 17, 1909.]

THE STATE OF WASHINGTON, *Respondent*, v. LUDWIG
MYRBERG, *Appellant*.¹

INDICTMENT AND INFORMATION—SUFFICIENCY—TIME OF OFFENSE. An information charging the offense of rape on "a certain day within three years next preceding" the filing of the information, is sufficiently definite as to time, under Bal. Code, § 6845, providing that the precise time need not be stated except where time is a material ingredient in the crime, and that it may be alleged to have been committed at any time within the limitation for prosecution.

SAME—NAME OF PROSECUTRIX—VARIANCE. It is not a fatal variance to allege a rape upon a child named Frieda, and to prove the name Valfreda, as given in Holland, where, after coming to this country, the child was generally known as Frieda.

RAPE—COMPLAINTS BY PROSECUTRIX — EVIDENCE — ADMISSIBILITY. In a prosecution for rape of a child nine years of age, in the last of February or first of March, complaints made by the child "about the first or middle of March" are seasonably made, and therefore admissible in evidence.

WITNESSES — CAPACITY OF CHILD—DISCRETION—APPEAL—REVIEW. Whether a child nine years of age has sufficient capacity to understand the nature of an oath and is competent to testify is a matter within the trial court's discretion, not to be disturbed on appeal except for abuse of discretion.

Appeal from a judgment of the superior court for Chelan county, Grimshaw, J., entered May 22, 1909, upon a trial and conviction of rape. Affirmed.

Crass & Porter, for appellant.

Fred Kemp and Ludington & Kemp, for respondent.

¹Reported in 105 Pac. 622.

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Opinion Per MORRIS, J.

MORRIS, J.—Appellant was informed against and convicted of rape upon Frieda Johnson, a female child of the age of nine years. He brings this appeal and predicates error upon the holding of the court below that the information was sufficient as against his demurrer, and his objection to the introduction of testimony, and in denying his motions for discharge, for new trial, and in arrest of judgment. Other assignments of error will be referred to later. The charging part of the information as to the time the crime was committed was “on a certain day before the filing of this information within three years next preceding its filing.”

The errors above alleged all raise the same question, was the time properly and sufficiently charged. We think it was. Our statutes relative to this question are as follows:

“The precise time at which the crime was committed need not be stated in the indictment or information; but it may be alleged to have been committed at any time before the finding of the indictment or the filing of the information, and within the time in which an action may be commenced therefor, except where the time is a material ingredient in the crime.” Bal. Code, § 6845.

“The indictment or information is sufficient if it can be understood therefrom,—. . . 5. That the crime was committed at some time previous to the finding of the indictment, or filing of the information, and within the time limited by law for the commencement of an action therefor.” Bal. Code, § 6850.

“Prosecutions for the offenses of murder and arson, where death ensues, may be commenced at any period after the commission of the offenses; for offenses the punishment of which may be imprisonment in the penitentiary, within three years after their commission.” Bal. Code, § 6780.

Under a subsequent section the penalty for conviction of the crime of rape is fixed at imprisonment in the penitentiary for life or any term of years. Bal. Code, § 7062. The limitation for an information for rape was therefore three years, and the information charging the commission of the crime

"within three years next preceding its filing," was a sufficient compliance with these statutes. We think it better to allege a specific day when such allegation is possible, but it doubtless will oftentimes occur, as in this case, where the child was of tender years and had no knowledge or memory of the calendar day, that it would be impossible to fix a specific day. Even though the information had fixed a specific day, it would not be contended that the commission of the act proved upon any other day within the statute of limitations would not be a sufficient and proper time under the information. The case is controlled by *State v. Gottfreedson*, 24 Wash. 398, 64 Pac. 523, where a similar charge as to time was held sufficient. The rule there announced is supported by abundant authority, it being generally held that the day upon which an offense is committed or charged to be committed is immaterial, except in those offenses where time is of the essence of the crime or a necessary ingredient in its description. *State v. Barnett*, 3 Kan. 250, 87 Am. Dec. 471; *Conner v. State*, 25 Ga. 515; *People v. Miller*, 12 Cal. 291; *People v. Jackson*, 111 N. Y. 362, 19 N. E. 54; *Kenney v. State*, 5 R. I. 385; *State v. Findley*, 77 Mo. 338; *Myers v. State*, 121 Ind. 15, 22 N. E. 781; *State v. Swain*, 97 N. C. 462, 2 S. E. 68; *State v. Peters*, 107 N. C. 876, 12 S. E. 74; *McCarty v. State*, 37 Miss. 411.

The name of the injured child as given in the information was Frieda. Her father, a witness for the state, testified that her name was Valfreda. Counsel for appellant hereon bases his contention that there was a fatal variance between the information and the proof. The testimony of the father was that in Holland, from whence the family came, the name was Valfreda, but that since being in this country she was called and known as Frieda. Whatever name the child was generally known by was her proper designation in the information. Where a person upon whom a crime is committed is referred to by the name he or she is generally known by in the neighborhood where the crime is committed, the use of

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such name in the information is proper, and there can be no fatal variance upon proof that the baptismal name or true name is otherwise. Such is the undoubted rule. *State v. Seely*, 30 Ark. 162; *Jones v. State*, 65 Ga. 147; *Robinson v. Commonwealth*, 88 Ky. 386, 11 S. W. 210; *Commonwealth v. Trainor*, 123 Mass. 414; *People v. Leong Quong*, 60 Cal. 107; *Reddick v. State*, 25 Fla. 112, 433, 5 South. 704; *Vandermark v. People*, 47 Ill. 122; *Ehlert v. State*, 93 Ind. 76; *Bell v. State*, 25 Tex. 575; *State v. Johnson*, 67 N. C. 55; *McBeth v. State*, 50 Miss. 81; *State v. Bundy*, 64 Me. 507; *State v. Peterson*, 70 Me. 216. Such is also the rule in England. *Rex v. Norton*, 1 Russ. & Ryan (Crown Cases) 509.

Complaint is next made of instructions to the jury numbered 8 and 12. Instruction No. 8 was evidently taken by the court from *State v. Harras*, 25 Wash. 416, 65 Pac. 744, as it is a duplicate of instructions there held to correctly state the law. No other comment need be made. It was good law and applicable to the facts in the case. Its only fault was its length. It would be better in criminal cases to make the instructions as short and pithy as a proper submission of the law applicable to the facts will admit. Long drawn-out instructions, although correctly stating the law, are more apt to be misleading and confusing to the jury than a clear, crisp statement of the law without repetition or enlargement. Instruction No. 12 is conceded to be correct, if evidence of two women to whom the girl made complaint was properly received. It is proper to prove that the injured female made complaint, when such complaint is seasonably made. The testimony of one of these women as to complaints was stricken by the court. The other testified to a complaint "about the first or middle of March." The time of the act was fixed by the state as the last of February or first of March. The evidence was properly received, and was within the rule as to time, and the instruction based upon such evidence was proper.

Complaint is also made that Frieda Johnson was not a competent witness on account of her age and lack of understanding of the nature and quality of an oath. The record contains a long examination of the witness by the state and by counsel for appellant, for the purpose of testing her qualification. We cannot here recite all the testimony of the girl upon such examination. It is sufficient to say that she was qualified, and her testimony was properly received. This was a matter resting largely within the discretion of the lower court, who has the offered witness before him, and its ruling will seldom be disturbed on appeal, unless there is a showing of manifest abuse of such discretion. *State v. Bailey*, 81 Wash. 89, 71 Pac. 715.

The sheriff testified to a confession of appellant, and the admission of such confession in evidence is attacked upon the ground that it was not voluntary. There is no evidence that it was other than voluntary. There is no evidence of threats, inducements, fear, or other situations which would render such confession inadmissible. The evidence shows the appellant sobbed out the story of his guilt, with tears. They may have been tears of penitence, or they may have been tears of sorrow at his appreciation of what he conceived awaited him, but there is nothing to show the exercise of any improper motive or act on the part of the sheriff.

Appellant had a fair and impartial trial, without error, and the judgment against him is affirmed.

RUDKIN, C. J., CHADWICK, FULLERTON, and GOSE, JJ., concur.

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Opinion Per CHADWICK, J.

[No. 8292. Department One. December 17, 1909.]

CHARLES L. WINGARD, *Appellant*, v. LUELLA WINGARD,
Respondent.¹

HUSBAND AND WIFE—COMMUNITY PROPERTY—ACQUISITION AFTER DIVORCE. Land settled upon by a husband and wife who were trespassers and without claim of right or title or any equity, is not their community property by reason of pending negotiations for its purchase and improvements placed thereon by them; and where, after a decree of divorce which did not mention the property, the land was purchased by the husband, who had remained in possession, the same is his separate property, notwithstanding the purchase was made on the terms of the negotiations pending before divorce, and notwithstanding that, in an ejectment suit, the husband by his answer had made a claim of right antedating the divorce decree.

SAME — ESTOPPEL — ADMISSION IN PLEADING — PARTIES AFFECTED. The wife, having no equity, could not avail herself of any admissions by the husband in the ejectment suit.

Appeal from a judgment of the superior court for Walla Walla county, Brents, J., entered July 15, 1909, upon findings in favor of the defendant, after a trial on the merits before the court without a jury, in an action to quiet title. Reversed.

Herbert C. Bryson, for appellant.

H. S. Blandford, for respondent.

CHADWICK, J.—The parties to this action were married in the year 1892, and such relation continued until March 21, 1906. This suit is brought to recover a half interest in a certain tract of land, alleged to be the property of the parties and acquired during coverture. The evidence shows that, prior to 1898, the mother of respondent was in the occupation of a certain five-acre tract of land near the city of Walla Walla, belonging to the Woodsville Guaranty & Savings Bank, a New Hampshire corporation, and that she had

¹Reported in 105 Pac. 834.

had some correspondence with the bank with reference to the purchase of the property. In that year she abandoned possession of the land and such rights as she may have had therein, and permitted the Wingards to move onto the property.

In 1901 negotiations were opened by appellant, through an attorney, for the purchase of the land, a price was agreed upon, and a deed executed and sent to the Baker-Boyer National Bank for delivery. The deed was in form a quitclaim, and for that reason was rejected by the appellant. Nothing further was done toward consummating the transaction by either party, although the Wingards continued to occupy the land and had put some considerable improvements thereon. In 1905 respondent left appellant and, after a due season, began an action for divorce in Pierce county, Washington. In her complaint she described certain property which she asserted to be community property. She included the property now in controversy. The suit for divorce was transferred, upon motion of the defendant, appellant here, to Walla Walla county, where it went to trial upon appellant's answer and cross-complaint, respondent thereafter defaulting. In that case the court made a decree awarding the community property, but no mention is made of the tract now sought to be charged. The decree of divorce was entered March 21, 1906, and on June 15, 1906, the Woodville bank began suit in ejectment against appellant who had remained in possession of the property. Pending this suit, negotiations were resumed between appellant and the attorneys for the bank, which resulted in the payment of the sum then agreed upon as the purchase price, and a dismissal of the suit under a stipulation that the Woodville bank had no interest and was not then the owner of the land. The trial court found that the property was community property, and decreed a partition.

Appellant contends that the first negotiations for the land having failed, it could not, after the dissolution of the mar-

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riage, be impressed with a community character; that the decree in the divorce suit was *res judicata*, and that his purchase was an independent transaction, made in his own behalf and with his own funds which he had borrowed for that purpose. On the other hand, respondent contends, and the court so held, that because the property was more valuable than the price paid, and because the purchase price as finally agreed upon was the same as that first agreed upon, with interest, and considering the residence and improvements made by the parties when living there as husband and wife, the land was in equity subject to partition as community property. Reliance is also put upon allegations in the answer subscribed by appellant in the ejectment suit, in which appellant sets up his interest as accruing at the time of his first negotiations, and also upon the stipulation in which the bank agreed that at the time it had no interest.

The case is submitted on the facts without reference to any authorities to aid us in our solution of the problem, and in the time we have had to devote to this case our own research has been equally unavailing. However, considering the equities of the case, we are forced to disagree with the learned trial judge. Respondent cannot recover, for under the admitted facts in the case, there was no time from the date of the original occupancy until the divorce was granted, or until the ejectment suit was settled, that appellant or respondent, either as a community or acting as individuals, could have maintained an action to compel a conveyance. Their rights rested upon no equities whatever. They were trespassers while there as husband and wife, and thereafter appellant continued in simple trespass of the rights of the bank. Their occupancy was never hostile. The bank was at no time bound in equity to convey to them, or either of them, the land, or any part thereof. When the decree of divorce was signed, it could not operate upon this land, for the reason that neither the husband nor the wife had any interest in it either in law or equity, nor did the court attempt to award it, although its

attention was called thereto by the original complaint in the action.

While there is a dearth of authority to cover this case, it seems to be somewhat analogous to the case of *Hall v. Hall*, 41 Wash. 186, 83 Pac. 108, 111 Am. St. 1016. In that case a husband and wife had settled upon vacant government land. The land had not been surveyed and was not open for filing. They had lived on the land for several years when the wife brought an action for divorce, which was granted. About a year thereafter the husband filed upon the land and, within another year, he proved up and obtained a patent, tacking his residence upon the land prior to the time it was thrown open, so that his title depended upon some of the time that his divorced wife resided with him. Upon the death of the husband, the first wife brought an action asserting a community interest in the land. It was held that the only interest that the decedent (the husband) had in the property, at the time of the divorce, was a right of occupancy coupled with a preference right to enter the land and acquire title thereto after the same was thrown open for settlement; that his right to the land depended upon continued residence and future compliance with the requirements of the homestead laws, and that, therefore, the wife had no equity in the land whatever.

So in this case, the parties had a mere occupancy but without the right of occupancy. Title to the land depended upon a contract and payment, which was not made or consummated until after the divorce proceeding, and then only as a result of the ejectment suit. If the divorced wife would not recover in that case, assuredly there can be no recovery in this. There being no equity in favor of respondent, she cannot avail herself of any admissions in the answer in the ejectment suit. Nor is she benefited by the terms of the stipulation. The one was an allegation with no foundation in fact; the other was made after settlement and in aid of the deed.

For these reasons therefore the judgment of the lower

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court is reversed, with instructions to enter a decree as prayed for.

RUDKIN, C. J., GOSE, FULLERTON, and MORRIS, JJ., concur.

[No. 8351. Department One. December 17, 1909.]

NORTHERN MERCANTILE COMPANY, *Appellant*, v.
FRANK SCHULTZ, *Respondent*.¹

SALES—DELIVERY—ACCEPTANCE. A delivery and acceptance of cedar poles sold, is shown, where it appears that at the time of the sale they were on a river bank, that each pole was marked with chalk on the end by the vendee's agent, who stated he would send a barge therefor, and the vendor agreed to load them on the barge.

SALES—VALIDITY—PERFORMANCE. A sale of cedar poles is not affected by the fact that some were cut from dead trees, as that affected only the quality; nor by the fact that some were cut from the vendor's homestead claim prior to final proof.

Appeal from a judgment of the superior court for Stevens county, Carey, J., entered April 5, 1909, upon findings in favor of the defendant, after a trial on the merits before the court without a jury, in an action on an account. Affirmed.

Alva S. Sherlock and Judson & Rochford, for appellant.

W. H. Jackson and S. Douglas, for respondent.

MORRIS, J.—Appellant brought this action to recover \$241.61 due upon merchandise sales between June 19 and November 1, 1907. Respondent, answering, admitted the purchase of the merchandise, the value as alleged, and that he had not paid for same, and by way of counterclaim set forth that, on June 4, 1907, he sold appellant three hundred and seventy-six cedar poles for the sum of \$818, and that it was then agreed that all merchandise purchased by him from appellant should be credited upon the purchase price of the poles; and demanded judgment. The reply contested this

¹Reported in 105 Pac. 850.

counterclaim and, upon the issues thus joined, trial was had to the court. Findings and conclusions were handed down, sustaining the counterclaim and awarding respondent judgment in the sum of \$576.39, from which this appeal is taken.

The only question involved in the appeal is, Did the appellant purchase and accept delivery of the cedar poles? The court below so found, and a reading of the record establishes the correctness of such a finding. At the time of the sale, the poles were on the river bank, and the agent of the appellant, with a piece of lumberman's chalk, marked each pole across the end, and stated he would thereafter send a barge, and respondent agreed to load them upon the barge. This would be an acceptance and delivery, and did not mean that delivery was postponed until the loading upon the barge. The marking of the poles was a clear expression of intent to exercise ownership. It was an exercise of dominion over the poles, and manifested an acceptance and intention to claim them as the poles of appellant. *Pacific Lounge & Mattress Co. v. Rudebeck*, 15 Wash. 336, 46 Pac. 392; *Williams v. Ninemire*, 23 Wash. 393, 63 Pac. 534.

The fact that some of the poles were cut from dead trees did not affect the sale, but only the price to be paid for such poles. Neither is it material here that respondent had not made final proof upon his homestead claim from which some of the poles might have been cut.

Judgment affirmed.

RUDKIN, C. J., GOSE, CHADWICK, and FULLERTON, JJ., concur.

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Statement of Case.

[No. 8467. *En Banc*. December 18, 1909.]

*In the Matter of the Application of SUSAN S. NEWCOMB,
for a Writ of Habeas Corpus for Charles F. Newcomb.*¹

HABEAS CORPUS—GROUNDS—CORRECTION OF ERROR. Habeas corpus does not lie to review or correct error, under Bal. Code, § 5826, providing that the legality of any judgment or process, whereby a party is in custody shall not be inquired into or the party discharged when the term of commitment has not expired upon any process issued on a final judgment of a court of competent jurisdiction.

SAME—ERRORS NOT AFFECTING JURISDICTION—DRAWING JURY. Error in drawing and selecting a jury does not go to the jurisdiction of the court so as to entitle the defendant to a discharge on a writ of habeas corpus.

SAME—COURTS—JURISDICTION—DEPARTMENTS. There being but one superior court in a county, the fact that preliminary orders were made by judges other than the judge before whom the trial was had does not affect the jurisdiction of the court so as to entitle the defendant to a discharge on habeas corpus.

STATUTES—CRIMINAL LAW—OPERATION—TIME OF TAKING EFFECT—EX POST FACTO LAWS. The new criminal code (Laws 1909, p. 890), having provided in § 42 that nothing contained in any provision of the act shall apply to an offense committed or act done before the day when the act shall take effect, the former law (Bal. Code, § 7035) defining murder in the first degree was in full force and effect on May 14, 1909, although its prospective operation ceased after the taking effect of the new code; and no question of *ex post facto* laws can arise on a prosecution under the old law for an offense committed on that date.

HABEAS CORPUS—CORRECTION OF ERROR—JURISDICTION—FORCE OR VALIDITY OF STATUTES—RIGHT TO WRIT. Where the superior court having jurisdiction of an offense decided that the law defining the offense had not been repealed and was in force when the act was committed, the decision is within its jurisdiction, even if erroneous, and its final judgment is not void and cannot be questioned on a writ of habeas corpus, the remedy being by appeal, and this rule satisfies all the constitutional guaranties respecting the writ.

Application filed in the supreme court November 12, 1909, for a writ of habeas corpus to release a person held in custody

¹Reported in 105 Pac. 1042.

upon conviction of the crime of murder in the first degree. Denied.

Murray & Lefebvre, A. A. Howell, and J. Matthew Murray (Louis I. Lefebvre, of counsel), for petitioner.

The Attorney General and J. L. McMurray, for respondent.

RUDKIN, C. J.—Charles F. Newcomb was convicted of the crime of murder in the first degree, in the superior court of Pierce county, and is now in custody on process issued on the final judgment of that court. He has petitioned this court for a writ of habeas corpus, alleging that his restraint and imprisonment are illegal in this: first, because the jury law of 1909, Laws of 1909, p. 131, under which the jury was drawn and selected, is unconstitutional; second, because Department No. 3 of the superior court of Pierce county, presided over by Judge Chapman, had no jurisdiction to try him; and third, because on the 14th day of May, 1909, the date of the homicide, there was no law in this state defining or prescribing punishment for the crime of murder. Errors and irregularities such as those complained of cannot be inquired into or corrected on an application of this kind. Our statute provides that,

“No court or judge shall inquire into the legality of any judgment or process whereby the party is in custody, or discharge him, when the term of commitment has not expired, in either of the cases following: (1) Upon any process issued on any final judgment of a court of competent jurisdiction. . . . (3) Upon a warrant issued from the superior court upon an indictment or information.” Bal. Code, § 5826.

“A *habeas corpus* is not a writ of error. It cannot bring a case before us in such a manner that we can exercise any kind of appellate jurisdiction in it. On a *habeas corpus*, the judgment of even a subordinate court cannot be disregarded, reversed, or set aside, however clearly we may perceive it to be erroneous, and however plain it may be that we ought to

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reverse it if it were before us on appeal or writ of error. We can only look at the record to see whether a judgment exists, and have no power to say whether it is right or wrong. It is conclusively presumed to be right until it is regularly brought up for revision. We decided this three years ago at Sunbury, in a case which we all thought one of much hardship. But the rule is so familiar, so universally acknowledged, and so reasonable in itself, that it requires only to be stated." *Passmore Williamson's Case*, 26 Pa. St. 1.

See, also, *Ex parte Winston*, 9 Nev. 71.

All the courts acknowledge the existence and binding force of this general rule, but when we come to consider what constitutes error and what constitutes a want of jurisdiction they differ widely. The error complained of in the matter of drawing and selecting the jury manifestly did not go to the jurisdiction of the court, and cannot be considered at this time. *United States v. Gale*, 109 U. S. 65; *In re Wilson*, 140 U. S. 575; *Younger v. Hehn*, 12 Wyo. 289, 75 Pac. 443, 109 Am. St. 986; *In re Barbee*, 19 Wash. 306, 53 Pac. 155.

The objection to the jurisdiction of Judge Chapman is equally untenable. There is but one superior court of Pierce county, and all the judges of that court are equal in authority. The entire trial took place before Judge Chapman, and the fact that preliminary orders were made by other judges or in other departments is immaterial and did not affect the jurisdiction of the court.

Numerous questions have been discussed under the contention that there was no law in this state on May 14th of this year, defining or prescribing punishment for the crime of murder. We do not deem it proper to go into that question at this time, further than is necessary to present the question with which the trial court was confronted. Bal. Code, § 7035, defining the crime of murder in the first degree, was in full force and effect on that date, but its prospective operation as a law ceased, as soon as the new criminal code took effect, ninety days after the adjournment of the legislature. There is no question of *ex post facto* laws in this

case. Section 42 of the new criminal code (Laws 1909, p. 890, ch. 249) expressly provides that, "Nothing contained in any provision of this act shall apply to an offense committed or act done at any time before the day when this act shall take effect"; and in the light of this provision, any discussion of the constitutionality of *ex post facto* laws is beside the question.

The question, and the only question before the trial court on this branch of the case, was this: Was Bal. Code, § 7035, continued in force, as to the particular offense here involved, by virtue of either the saving clause found in § 42 of the new criminal code, or the general saving clause enacted at the extraordinary session of 1901, Laws of 1901, Special Session, p. 13? The superior court was vested with full and complete jurisdiction to determine that question, and whether its determination was right or wrong its jurisdiction to hear the case continued and its final judgment is not void. The authorities are by no means agreed upon the proposition, but in our opinion, if a court of general jurisdiction determines a question of law or fact, properly before it in the exercise of its acknowledged jurisdiction, its determination cannot be void, however erroneous it may be.

In *Ex parte Watkins*, 28 U. S. 193, Chief Justice Marshall said:

"An imprisonment under a judgment cannot be unlawful, unless that judgment be an absolute nullity; and it is not a nullity, if the court has general jurisdiction of the subject, although it should be erroneous. The circuit court for the district of Columbia is a court of record, having a general jurisdiction over criminal cases. An offense cognizable in any court, is cognizable in that court. If the offense be punishable by law, that court is competent to inflict the punishment. The judgment of such a tribunal has all the obligation which the judgment of any tribunal can have. To determine whether the offense charged in the indictment be legally punishable or not, is among the most unquestionable of its powers and duties. The decision of this question is the exercise of jurisdiction, whether the judgment be for or

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against the prisoner. The judgment is equally binding in the one case and in the other; and must remain in full force, unless reversed regularly by a superior court, capable of reversing it. If this judgment be obligatory, no court can look behind it. If it be a nullity, the officer who obeys it is guilty of false imprisonment. Would the counsel for the prisoner attempt to maintain this position? . . . The judgment of the circuit court, in a criminal case, is, of itself, evidence of its own legality, and requires for its support, no inspection of the indictment on which it is founded. The law trusts that court with the whole subject, and has not confided to this court the power of revising its decisions. We cannot usurp that power, by the instrumentality of the writ of *habeas corpus*. The judgment informs us, that the commitment is legal, and with that information, it is our duty to be satisfied."

In *Ex parte Parks*, 93 U. S. 18, Mr. Justice Bradley said:

"But the question whether it was or was not a crime within the statute was one which the district court was competent to decide. It was before the court, and within its jurisdiction. No other court, except the circuit court for the same district, having concurrent jurisdiction, was as competent to decide the question as the district court. Whether an act charged in an indictment is or is not a crime by the law which the court administers (in this case the statute law of the United States), is a question which has to be met at almost every stage of criminal proceedings; on motion to quash the indictment, on demurrers, on motions to arrest judgment, etc. The court may err, but it has jurisdiction of the question. If it errs, there is no remedy after final judgment, unless a writ of error lies to some superior court; and no such writ lies in this case. It would be an assumption of authority for this court, by means of the writ of *habeas corpus*, to review every case in which the defendant attempts to controvert the criminality of the offense charged in the indictment."

In *Commonwealth ex rel. Davis v. Lecky*, 1 Watts (Pa.) 66, 26 Am. Dec. 37, Chief Justice Gibson said:

"The *habeas corpus* is undoubtedly an immediate remedy for every illegal imprisonment. But no imprisonment is illegal when the process is the justification of the officer; and

process, whether by writ or warrant, is legal whenever it is not defective in the form of it, and has issued in the ordinary course of justice from a court or magistrate having jurisdiction of the subject-matter, though there may have been error or irregularity in the proceedings previous to the issuing of it."

In the *Williamson* case, *supra*, Judge Black said:

"Every judgment *must* be conclusive until reversed. Such is the character, nature, and essence of all judgments. If it be not conclusive it is not a judgment. A court must either have power to settle a given question finally and forever, so as to preclude any further inquiry upon it, or else it has no power to make any decision at all. To say that a court may determine a matter, and that another court may regard the same matter afterwards as open and undetermined, is an absurdity in terms."

See, also, *Ex parte Bigelow*, 113 U. S. 328; *In re Belt*, 159 U. S. 95; *In re Eckart*, 166 U. S. 481.

We are aware that it has been said by high authority that the doctrine of *Ex parte Watkins* is no longer law in either the state or Federal courts. Church, Habeas Corpus (2d ed.), § 371, note 3. But the supreme court of the United States does not admit the accusation. The *Watkins* case was cited approvingly in the following cases: *Ex parte Parks*, 93 U. S. 18; *Ex parte Yarbrough*, 110 U. S. 651; *Ex parte Bigelow*, 113 U. S. 328; *In re Coy*, 127 U. S. 731; *In re Wilson*, 140 U. S. 575; *Noble v. Union River Logging R. Co.*, 147 U. S. 165.

In the *Coy* case it is intimated that the rule was stated too broadly in the *Watkins* case; and in the *Wilson* case it is said, "Subsequent decisions softened a little the rigor of the rule thus declared"; but no Federal case, so far as we are advised, has challenged its correctness beyond this, and we might add in our opinion it will be found much easier to disregard the decision than to meet the arguments by which it is supported. It must be confessed that we experience no little difficulty in harmonizing some of the decisions of the

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supreme court of the United States on this question. There is at least apparent conflict between the *Watkins*, *Parks*, and *Bigelow* cases, and *Ex parte Siebold*, 100 U. S. 371; *In re Snow*, 120 U. S. 274; *In re Neilsen*, 131 U. S. 176, and other cases that might be cited. Thus, in *Ex parte Bigelow* it was held that the question of former jeopardy could not be inquired into on habeas corpus, and such is the uniform holding in all the state courts. 21 Cyc. 305, and cases cited, including *Steiner v. Nerton*, 6 Wash. 23, 32 Pac. 1063, from this court. Nevertheless in *In re Neilsen* and *Ex parte Snow* the contrary was held. It may be that the latter cases can be distinguished on the ground that the court was there exercising appellate jurisdiction, where the scope of the inquiry under the writ is somewhat enlarged, as suggested by the supreme court of Colorado, in *People ex rel. Attorney General v. District Court*, 26 Colo. 380, 58 Pac. 608, 46 L. R. A. 855; but if not, other courts and text writers are justified in the conclusion that the cases are in direct conflict. A further review of these cases, or a further attempt on our part to reconcile them, would serve no useful purpose. Many courts hold that habeas corpus will lie for the discharge of one held under an unconstitutional statute, or a statute that has been repealed. We think, indeed, a majority of the more recent cases so hold. Nevertheless, there are many well-considered cases holding the contrary, for reasons which to our minds are unanswerable. Thus in *In re Callicot*, 8 Blatch. (U. S.) 89, it was contended that the statute under which the petitioner was held had been repealed before sentence was pronounced, and that the petitioner was illegally deprived of his liberty, but the court said:

“I have no jurisdiction to review the judgment of the circuit court of the United States for the eastern district of New York. That court had jurisdiction of the matters charged in the indictment, and to determine whether the acts there alleged constituted an offense against the laws of the United States, and, by the aid of a jury, to try and determine whether

the petitioner was guilty of those acts. From the judgment of that tribunal, no appeal lies to me as judge. No writ of error lies to me; and, if my opinion was, that the learned judges by whom the court was held when the judgment was pronounced committed an error, I have no power to revise or reverse the judgment."

In *Platt v. Harrison*, 6 Iowa 79, 71 Am. Dec. 389, the court said:

"The argument is, that the ordinance was passed without authority of law, and was null and void. Whether it was or not, was a legitimate subject of inquiry by the magistrate, in the same manner as any other question which might be presented for his adjudication. And being determined by him, adverse to the position of the prisoner, his remedy was by appeal, or writ of error, and not by *habeas corpus*. It is not a case where a court has acted without having jurisdiction. On the contrary, the most that can be claimed is, that the magistrate *erred* in deciding that the ordinance was in force, and that the city had the power and authority to provide for the punishment of the offense. Such cases, we do not think, can be reviewed in this manner. The petitioner has a perfect, well defined, and complete remedy, in the regular and usual method of appeal. After conviction by a court having jurisdiction, though the conviction may be irregular or erroneous, the party is not entitled to this writ. The judgment and proceedings of another competent court, cannot be revised upon *habeas corpus*. This, we understand to be well settled."

In *Ex parte Winston, supra*, the court said:

"In the case under consideration the justice of the peace has not exceeded his jurisdiction. By the express provisions of the statute . . . the justice of the peace has original jurisdiction of the subject-matter. It was his duty to decide whether or not the law of 1861 had been repealed by implication or otherwise. In no other way could the question be raised. Such was the subject-matter with which he had to deal. That he had jurisdiction to determine this question cannot be denied. Such being the fact, his judgment may be erroneous but it cannot be void. If the justice erred, petitioner has his remedy by appeal to the district court. The

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judgment of the justice is conclusive until reversed. It cannot be reviewed upon *habeas corpus*."

See, also, *In re Underwood*, 30 Mich. 502; *Ex parte Fisher*, 6 Neb. 309; *Koepke v. Hill*, 157 Ind. 172, 60 N. E. 1039, 87 Am. St. 161; *People ex rel. Birkholz v. Jonas*, 173 Ill. 316, 50 N. E. 1051; *Petition of Semler*, 41 Wis. 517; *In re Pikulik*, 81 Wis. 158, 51 N. W. 261; *In re French*, 81 Wis. 579, 51 N. W. 960; *Parker v. State*, 5 Tex. App. 579; *Ex parte Boenninghausen*, 91 Mo. 301, 1 S. W. 761; *People ex rel. Attorney General v. District Court, supra*; *People ex rel. Miller v. District Court*, 33 Colo. 328, 80 Pac. 888, 108 Am. St. 98.

Our own decisions are in harmony with these views, though doubtless conflicting statements may be found in some of the cases. *Ex parte Williams*, 1 Wash. Ter. 240; *In re Rafferty*, 1 Wash. 382, 25 Pac. 465; *In re Lybarger*, 2 Wash. 131, 25 Pac. 1075; *Steiner v. Nerton, supra*; *In re Barbee*, 19 Wash. 306, 53 Pac. 155; *In re Nolan*, 21 Wash. 395, 58 Pac. 222; *Smith v. Sullivan*, 33 Wash. 30, 73 Pac. 793; *In re Russell*, 40 Wash. 244, 82 Pac. 290, 111 Am. St. 910. In the *Permstick* case, 3 Wash. 672, 29 Pac. 350, 28 Am. St. 80, the judgment and commitment were void upon their face. In the *Dietrick* case, 32 Wash. 471, 73 Pac. 506, and other cases that might be cited, the question here discussed was not considered or decided.

After a full and exhaustive examination of the authorities, we are convinced that the judgment of the superior court of Pierce county is not void for any of the reasons assigned. That court had full and complete jurisdiction to determine every question here presented, and its determination is not and cannot be void. We are further of opinion that where a party is held in custody under process issued on the final judgment of a court of competent jurisdiction, or upon a warrant issued from the superior court upon an information or indictment, he is not entitled to his discharge on *habeas corpus* unless such process or judgment be void, and a judg-

ment is not void simply because the court decided erroneously some question properly before it and within its acknowledged jurisdiction. In habeas corpus matters we exercise original, not appellate jurisdiction, and, as well said in *Ex parte Fisher, supra*:

“To entertain jurisdiction in such case upon a writ of *habeas corpus*, it would be necessary to look beyond the judgment, and re-examine the charges upon which it was rendered, as well as to review the questions of law raised on the trial and decided by the inferior court. If such practice were to obtain, then indeed every conviction for a criminal offense might be brought here for review on a writ of *habeas corpus*. We think it is not within the province of this court to open the door to such a system of practice. And we are not prepared to say that, upon a writ of *habeas corpus*, we can look beyond the judgment and re-examine the charges upon which it was rendered, or to pronounce the judgment an absolute nullity on the ground that the constitutionality of the statute relative to the license law is controverted. If the validity of a statute is brought in question in an inferior court on the trial of a cause, that question must finally be determined in the same mode as other legal questions arising on the trial of causes in such court—that is, by proceedings in error or appeal, as may be most appropriate and allowable by law.”

To say that an unconstitutional law or a repealed law is no law is both logical and sound, but to say that a judgment of a court of competent jurisdiction is no judgment, because some question of law properly before it was decided erroneously, is, in our opinion, a *non sequitur*. The rule here announced fully satisfies the constitutional guaranties respecting the writ of habeas corpus, and prescribes an orderly system for the administration of public justice. The application for the writ is accordingly denied.

ALL CONCUR.

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[No. 8479. Department One. December 18, 1909.]

*In the Matter of the Application of ORTIS HAMILTON for a
Writ of Habeas Corpus.*¹

HABEAS CORPUS—CORRECTION OF ERRORS—JURISDICTION—FORCE OR VALIDITY OF STATUTES—RIGHT TO WRIT. Where the superior court having jurisdiction decided that the law defining the offense had not been repealed and was in force when the act was committed, the decision is within its jurisdiction, even if erroneous, and habeas corpus does not lie to correct the same or to secure a discharge of the prisoner, his remedy being by appeal from the final judgment.

SAME—PURPOSE OF WRIT—RELIEF SOUGHT. A writ of habeas corpus should not issue for the purpose of giving the prisoner an immediate trial as to the legality of his imprisonment, where he was about to have an immediate trial in a court of competent jurisdiction; nor for the purpose of delaying such trial.

Application filed in the supreme court November 19, 1909, for a writ of habeas corpus to release a prisoner held in custody pending trial for the crime of embezzlement. Denied.

T. M. Vance and J. W. Robinson, for petitioner.

W. F. Magill, Assistant Attorney General, and *John M. Wilson*, for respondent.

RUDKIN, C. J.—On the 19th day of November, 1909, a petition for a writ of habeas corpus was presented to the chief justice of this court on behalf of Ortis Hamilton, who is confined in the county jail of Thurston county, awaiting trial on certain informations filed against him in the superior court of that county. On the presentation of the petition, an order was made directing the sheriff of Thurston county to show cause before the superior court of that county on the 3d day of December, 1909, why the writ should not issue as prayed. On the 20th day of November, 1909, the prosecuting attorney for Thurston county moved the chief justice to vacate the show cause order, or to change the return day to some date not later than November 23, 1909, for the reason

¹Reported in 105 Pac. 1046.

that the trial of the informations upon which the petition is held was set for the latter date. On the hearing of this motion, the chief justice vacated the show cause order, with leave to renew the application for a writ of habeas corpus before the supreme court on the following morning. At that time the application was heard by the court and denied, except to order the accused admitted to bail in the sum of \$20,000, but no opinion was filed.

It appears from the petition that a number of informations have been filed in the superior court of Thurston county, accusing the petitioner of the crime of embezzlement, under Bal. Code, §§ 7119, 7123, and the principal contention of the petitioner is that these sections have been repealed by the new criminal code (Laws 1909, p. 890, ch. 249). The superior court of Thurston county was fully competent to pass upon that question, and the petition shows that the court did pass upon it by overruling demurrers challenging the sufficiency of the informations. The case therefore falls within the decision in *In re Newcomb*, ante p. 395, 105 Pac. 1042.

But there are additional reasons why the petition should be denied in this case. The office of the writ of habeas corpus is to give a person restrained of his liberty an immediate hearing so that the legality of his detention may be inquired into and determined. The petitioner has a right to an immediate trial of that issue in a proper case, but he has no right to select his own forum or to prescribe the mode of trial. In this case it was made to appear that the petitioner was about to have an immediate trial of all questions involving his guilt and the legality of his imprisonment, in a court of competent jurisdiction, and the writ of habeas corpus could give him no more. If the purpose of the application was to secure an immediate trial, that object has already been accomplished. If the purpose was to secure delay or a postponement of the pending trial, the application should not be entertained. For these reasons the writ was and is denied.

GOSE, CHADWICK, MORRIS, and FULLERTON, JJ., concur.

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Statement of Case.

[No. 8401. Department One. December 18, 1909.]

ANNA SULLIVAN BENNETT *et al.*, *Respondents*, v. SEATTLE
ELECTRIC COMPANY, *Appellant*.¹

APPEAL—DECISION—LAW OF CASE. A decision on a former appeal that certain evidence raised a mixed question of law and fact is conclusive on a second appeal.

APPEAL—REVIEW—VERDICT. A verdict on conflicting evidence will not be set aside on appeal although a different conclusion would have been reached by the appellate court.

CARRIERS—DRUNKEN PASSENGER—CONTRIBUTORY NEGLIGENCE. A carrier having accepted a passenger who was unable to care for himself by reason of intoxication, his duty to care for his own safety should be measured by his condition as to sobriety, as a corollary of the rule that the company owed him a duty commensurate with his condition (CHADWICK and MORRIS, JJ., dissenting).

WITNESSES—REPUTATION—APPEAL—HARMLESS ERROR. It is not prejudicial error to allow a witness to preface his testimony with the statement that he was a deputy county assessor, in that good reputation cannot be shown until the same is attacked, as it only incidentally touched his reputation.

TRIAL—MISCONDUCT OF COUNSEL—APPEAL—HARMLESS ERROR. It is not ground for reversal that on examining a photograph, counsel made a statement outside of the record that "timbers have been put on since."

CARRIERS — NEGLIGENCE — SETTING DOWN PASSENGERS — INSTRUCTIONS. In an action for negligence of a carrier in putting off an intoxicated passenger at a dangerous place, it is applicable and proper to instruct that the carrier owed to its passengers the highest degree of care and prudence practicably consistent with the operation of its road and letting them on and off its cars.

COSTS—ATTORNEY'S FEES. Upon the second successful jury trial of a case, after a reversal on appeal, the plaintiff is entitled to tax but one statutory attorney's fee, under Bal. Code, § 5172, which has reference only to the final judgment in the case.

Appeal from a judgment of the superior court for King county, Gilliam, J., entered March 12, 1909, upon the verdict of a jury rendered in favor of the plaintiffs, in an action

¹Reported in 105 Pac. 825.

for the death of a passenger permitted to alight from a street car at a dangerous place while in an intoxicated condition. Modified.

James B. Howe and *A. J. Falknor*, for appellant.

John E. Humphries and *George B. Cole*, for respondent.

Gose, J.—This action, instituted by the widow and minor children of David Sullivan, deceased, to recover damages for his death, which it is alleged was caused by the negligence of the appellant, terminated in a verdict and judgment for the plaintiffs, from which the defendant prosecutes this appeal.

During the pendency of the case the widow remarried. The case has been before this court on two former appeals, where a full statement of the facts will be found. *Sullivan v. Seattle Elec. Co.*, 44 Wash. 53, 86 Pac. 786; *Id.*, 51 Wash. 71, 97 Pac. 1109. In brief, the charge of negligence is that David Sullivan, in the nighttime, and when in a drunken and helpless physical condition, entered upon one of the street cars of the appellant, it being a common carrier of passengers, as a passenger, and paid his fare; that his condition was known to the appellant; that when the car was on the trestle work and bridge along the shore of Lake Union, the night being dark and there being no sufficient lights and at a dangerous place, as the appellant well knew, it negligently allowed him to alight from the car upon the trestle work and bridge, there being no guards or rails at that place, and that he fell through the trestle work into the water of the lake and was immediately drowned.

On the first appeal we stated the rule to be "that a carrier owes to the passenger a duty commensurate with his condition," and that after it receives a passenger who is helpless or incapacitated, it must exercise toward him that degree of care necessary to keep him from harm." On the second appeal we thus defined the issues:

"The issues in this case are, first, was the deceased intoxicated; second, did the servants of the appellant have

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actual notice of his condition; third, was the place where the deceased was permitted to alight from the car a reasonably safe place to land a person in his condition; and fourth, was the act of the appellant or its servants in suffering and permitting the deceased to leave the car at that particular time and place and in his then condition the natural and proximate cause of his death. If the jury should find all of these issues in favor of the respondents they would be entitled to a verdict, and the mere fact that the deceased fell into the lake from the platform or trestle by reason of his intoxication—if he did so fall—would not of itself preclude a recovery, as the appellant was bound to anticipate such negligence on his part.”

The evidence tends to show, that the deceased was received as a passenger on one of the appellant's cars when in such a state of intoxication as to be incapable of taking care of himself; that he was permitted to alight, either upon the trestle along the shore of Lake Union, upon a dark night, where there were no guards or barriers, or at a point a few feet distant upon the platform at Hinckley station, where there were no guards or barriers where the car entered or left the platform; that the water at that point was about twenty-six feet deep, and about five days later his body was taken out of the lake at a point a few feet from the south entrance of the car line to the platform; that the car upon which he was riding was traveling toward the north, and that his death was caused by drowning. Numerous errors are assigned, but most of the questions sought to be raised were decided adversely to the appellant on the former appeals.

It is first urged that the respondents were not entitled to recover, for the reasons (1) that it was not shown that the place where deceased got off the car was not a reasonably safe place for one in his condition to alight, (2) that he was guilty of contributory negligence, and (3) that it is impossible to determine from the evidence the actual cause of his death. These questions were raised, first, by a motion

for a directed verdict, and, second, by a motion for a judgment *non obstante*. That these were questions of mixed law and fact was settled in the former appeals.

There was, as we have seen, evidence tending to show that the place where the deceased got off was not a reasonably safe place for a drunken man to alight. We cannot usurp the functions of the jury and say that the preponderance of the evidence was against their conclusion. Had the writer been a juror he would have reached a conclusion different from that found by the jury on that question, but that does not authorize us to overrule their verdict. The jury is the tribunal designated by the constitution to try such questions, and when their verdict is based upon competent testimony, and is free from passion and prejudice, the court will not overrule their determination upon a pure question of fact. The evidence is conclusive that the deceased came to his death by drowning. No bruises were found upon the body. It was taken out of the water within a few feet of the place at which at least two of the witnesses testified he alighted from the car, and within a few feet of the south side of the platform. There is no evidence that he was ever seen alive after the car left the platform. The law has taken human life upon less evidence of the *corpus delicti*. On the first appeal we said that the appellant owed the deceased a duty commensurate with his condition. The corollary of this rule must be that his duty to care for his own safety should be measured by his condition as to sobriety. *Price v. St. Louis etc. R. Co.*, 75 Ark. 479, 88 S. W. 575, 112 Am. St. 79. As we shall see, the jury were properly instructed upon the question of his negligence.

A witness for the respondent was permitted to premise his testimony with the statement that he was a county assessor at the time of the accident, which he later corrected by saying that he was then a deputy assessor. This is assigned as error, on the ground that evidence of the good reputation of a witness cannot be given until his reputation has been as-

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sailed. We think the objection is without merit. The question was the usual one in the introduction of a witness to the jury. It only incidentally touched his reputation. It is true, as argued by the appellant, that evidence as to the good reputation of a witness cannot be given until his reputation has been attacked. But the evidence to which the objection is raised does not fall within the rule. Rules of evidence are to be applied, not to thwart, but to aid in, the administration of justice.

While a witness was examining a photograph of Hinckley station, counsel for appellant stated, "These timbers have been put on since." This is urged as error. It frequently happens in the trial of a cause that counsel will make some remark not strictly within the record. If all such cases were reversed, finality in a lawsuit would be more of a hope than a reality. We must credit the jury with the possession of common sense and assume, when questions like this are raised, that they distinguished between the sworn testimony of the witness and the casual remark of counsel.

The court instructed the jury as follows:

"A common carrier of passengers is required under the law to exercise towards its passengers the highest degree of care and prudence practicably consistent with the operation of its road in the carrying of persons and in letting them on and off its cars."

It is urged that this instruction was inapplicable to the issues, and hence erroneous. There was no error in the instruction.

Error is assigned in the refusal of the court to give certain proposed instructions. In so far as they correctly stated the law as announced in the former appeals, they were given in substance but in a somewhat different phraseology. The court in effect instructed the jury that the appellant was not required to receive a drunken passenger when unattended, but that if it did receive the deceased in a drunken condition, and had actual knowledge that he was so intoxicated as to

be incapable of taking care of himself, it was required to exercise towards him care commensurate with his condition; that the mere happening of an accident does not raise the presumption of negligence; that the appellant was not an insurer of the safety of its passengers; that when one becomes a passenger upon a car of a common carrier of passengers, he continues to be a passenger until such time as he has safely alighted from the car in a reasonably safe place; that the appellant could not lawfully put the deceased off the car or permit him to get off at a place where there was danger of his perishing or coming to harm, even though such place would be reasonably safe for one in a normal condition; that if the jury should find from the evidence that the deceased was in such a state of intoxication that it was dangerous to let him off the car at the station known as Hinckley station, or upon the trestle along the shore of the lake, and the appellant knew that it was unsafe for him to be let off the car, where the jury should find from the evidence he was let off, then it would be guilty of negligence; and that if the jury further found that by reason of such negligence the deceased fell into the water of the lake and was drowned, the respondent would be entitled to a verdict, unless the deceased failed to exercise that degree of care for his own safety which a person in his then condition would ordinarily use under like circumstances. The court then summarized the issues by reading from this case, *Sullivan v. Seattle Elec. Co.*, *supra*, the language we have quoted.

It is finally contended that the court erred in entering judgment for two statutory attorney's fees of \$15 each. Our code, Bal. Code, § 5172, provides that "when allowed to either party costs to be called the attorney's fee shall be as follows: . . . In all actions where judgment is rendered after impaneling a jury, \$15." The statute has reference to the judgment which finally determines the cause, and it seems clear that but one attorney's fee can be taxed as costs regardless of the number of trials. The respondents have cited

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Williams v. Morrison, 32 Fed. 682, as supporting their right to have two attorney's fees taxed as costs. In that case the court construed § 824 of the U. S. Revised Statutes, which allows a docket fee as costs "on a trial before a jury"; whilst as we have seen, our statute only authorizes the fee "where a judgment is rendered." In an action at law the court can impose no costs by way of attorney's fees except such as are expressly authorized by statute. *Larson v. Winder*, 14 Wash. 647, 45 Pac. 315.

The case will be remanded with directions to the trial court to modify the judgment to the extent of allowing but one statutory attorney's fee as costs. In all other respects the judgment will be affirmed. Neither party will recover costs.

RUDKIN, C. J., and FULLERTON, J., concur.

CHADWICK, J. (concurring)—I concur in the conclusion reached by Judge Gose, but not with that assurance I would wish to feel in passing upon a matter so important. I am moved to this determination solely upon the ground that the judgment of the trial court results from a proper application of the rules of law twice determined by this court to be the law of the case. Were it an original question, I would not be willing to apply the broad doctrine that, when a carrier receives a drunken passenger, it owes to him a duty commensurate with the degree of his intoxication, without some material qualifications. Sullivan entered appellant's car in a crowded city street where, as is well known, a company cannot select its passengers with any great degree of care. Although a carrier may surrender or waive its own rights, that rule affords no warrant for saying that it should or could waive the rights of other passengers who cannot stop their ears to the profane babble of a drunken man. Applied without qualification, the law of this case would impose a duty of carrying a drunken, profane passenger along with sensitive, refined people to a place of absolute safety, without regard to his usual stopping place, for although that be opposite his own home, it may be in a degree dangerous.

There were a large number of passengers on the car at the time Sullivan got aboard. So far as the record shows, they were ladies and gentlemen returning home from the peaceful engagements of the day. When Sullivan entered the car, he provoked an altercation with the conductor, and from that time until he got off indulged in loud, boisterous, profane, and obscene language. If the company was at fault, its greater offense was against the decent, law-abiding passengers under its care (to whom it owed at least an equal duty) in that it did not immediately put the offending passenger off the car, instead of endeavoring to pacify him while carrying him to an established station, where of his own choice and unassisted he left the car. The company performed its full duty to Sullivan, and should not be held liable if he wandered back on the track and was drowned. *Hutchinson, Carriers*, 994, and cases cited. It is no answer to this argument to say that the platform was open at both ends. It was necessary that it should be so for the cars to pass. Car tracks cannot be laid either upon land or over water without some attending dangers to the public.

Having said what in my judgment the law of the case should be, I now abide by, and subscribe to, the law of this case as previously declared by the court, for the interests of society demand that there be an end to this litigation.

MORRIS, J., concurs with CHADWICK, J.

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[No. 8202. Department One. December 18, 1909.]

GEORGE W. REESE *et al.*, *Appellants*, v. SIMON P. WESTFIELD
et al., *Respondents*.¹

VENDOR AND PURCHASER — CONTRACT — FORFEITURE — DEPENDENT AGREEMENTS. Where land was sold under a time contract for payment by installments, time being of the essence, and by the contract the vendor agreed to give an abstract, continued to date of delivery of the deed, and all the intermediate installments were paid, the vendor cannot declare a forfeiture for failure to pay the last installment when due, unless he has put the vendee in default by tendering the abstract and deed; since the acts agreed upon are concurrent, and the agreements mutual and dependent as regards the final payment.

Appeal from a judgment of the superior court for Yakima county, Preble, J., entered September 21, 1908, upon findings in favor of the defendants, after a trial on the merits before the court without a jury, in an action to recover possession of real property. Affirmed.

William B. Bridgman, for appellants.

Stephen E. Chaffee and Roberts & Udell, for respondents.

CHADWICK, J.—This appeal involves only one question of law. In November, 1903, plaintiff George W. Reese entered into an agreement in writing, whereby he agreed to sell to defendant Simon P. Westfield certain lands at Sunnyside in Yakima county. The contract was the usual time contract for the sale of lands, and provided for the payment of the purchase price in installments, the last payment becoming due May 1, 1907. Defendants Milton and Door have succeeded to the interests of Westfield. A request for an extension of time was asked after the last payment had become due, but was refused. On October 1, 1907, a forfeiture was declared, and this action was begun to recover possession of the property. The contract contained the following clause:

¹Reported in 105 Pac. 837.

"Time is the essence of this contract, and in case of failure of the said party of the second part to make either of the payments or perform any of the covenants on his part, this contract shall be forfeited and determined at the election of the said party of the first part; and the said party of the second part shall forfeit all payments made by him on this contract, and such payments shall be retained by the said parties of the first part in full satisfaction and liquidation of all damages by them sustained; and they shall have the right to re-enter and take possession of said land and premises and every part thereof. The parties of the first part hereby agree to give an abstract of title to said lot, continued to the date of delivery of deed to second party."

The court made, among others, the following finding: "That the two last payments above mentioned (being intermediate payments) were made subsequent to the time on which they became due, and were accepted by the plaintiffs." This forbearance, coupled with the time elapsing between the 1st of May, 1907, and the 1st day of October, 1907, might possibly bring this case within the rule of *Douglas v. Handbury*, ante p. 63, 104 Pac. 1110, but the facts are not before us, and for the sake of security in our judgment of the case, we have deemed it best to meet the main contention upon which appellant relies to defeat the judgment of the court below. The question is whether a forfeiture can be declared as against a purchaser who had met all payments under his contract except the last payment, when the contract provides for the giving of an abstract and delivery of the deed. Appellant seeks to distinguish the case of *Stein v. Waddell*, 37 Wash. 634, 80 Pac. 184, upon which he says the judgment of the lower court was based, saying:

"In the case of *Stein v. Waddell* the seller had accepted a portion of that last payment which was in default after default was made, and then a few days later declared the forfeiture."

But the decision in that case was not made to depend alone upon the payment of a part of the last installment. It rested

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in the stronger equity that the agreement to tender a deed was mutual, concurrent, and dependent upon the payment of the last installment due on the purchase price. This rule was there said to be firmly established by the authorities. 29 Am. & Eng. Ency. Law (2d ed.), pp. 686, 687. Such contracts are mutual and dependent when it appears that the payment and delivery of the deed are to be made at the same time. 29 Am. & Eng. Ency. Law (2d ed.), p. 689.

It is contended that the broad rule laid down in *Stein v. Waddell* was explained by the later cases, *Voight v. Fidelity Investment Co.*, 49 Wash. 612, 96 Pac. 162; *Garvey v. Barkley*, ante p. 24, 104 Pac. 1108, and *Sleeper v. Bragdon*, 45 Wash. 562, 88 Pac. 1036. In the first case it was pointed out that there was no obligation to tender a deed until all the payments had been made, and that the last payment was not due until two years after the commencement of the action to forfeit the contract. The point here involved was not before the court. In the second case, the purchaser had wholly failed to perform the conditions of his contract, and forfeiture had been promptly asserted. In *Sleeper v. Bragdon* the purchaser had made default and had obtained an extension under an understanding that, if payment was not made within the time given, the forfeiture would be insisted upon. She was notified in advance that the vendor had elected to forfeit the contract, and she knew that, by her own act in failing to meet the extended payment, the cancellation of the contract was completed, and that she was not entitled to any further consideration or notice. Notwithstanding this she sought to tender the amount due, and demanded performance. The court held, and properly, considering the facts of the particular case, that her rights had ceased. The cases really in line with the case of *Stein v. Waddell* are *Bruggemann v. Converse*, 47 Wash. 581, 92 Pac. 429, and *Tacoma Water Supply Co. v. Dumermuth*, 51 Wash. 609, 99 Pac. 741. In the first case it was said:

"The appellants, not having complied with the requirements of the contract in tendering a deed which was by the terms of the agreement made a condition precedent to receiving the purchase price, will not be heard to complain that the other party to the contract has violated its conditions."

In the latter case, after citing *Stein v. Waddell* and other cases, the court said:

"Under the above authorities, the respondents could only claim a forfeiture and put the appellant in default by tendering a deed and demanding payment of the purchase price, and this they failed to do."

If the case of *Stein v. Waddell* and the succeeding cases to which we have referred have been hitherto misunderstood, we desire now, for the sake of certainty, to lay down the rule that, where land is sold under a time contract calling for payment by installments, and every installment has been paid except the last one, the vendor may, if he act with reasonable promptness, declare a forfeiture, unless by the terms of the contract he has agreed to perform some act necessary to the complete performance of his agreement, as, for instance, the giving of an abstract or the tender of a deed, in which event his power to forfeit depends upon his offer and ability to perform; for, as this court has said, his duty to tender performance depends upon, and is concurrent with, the duty of the vendee to meet the final payment.

While we admit that the conditions providing for forfeiture in contracts of this character are usually held to be for the benefit of the vendor, and we have been hitherto, and are now, willing to give the vendor the full benefit of all the conditions of his contract, and say that all payments prior to the last payment are conditions precedent, we have no sympathy with the holding of some courts to the effect that the whole duty is upon the purchaser, and unless he tenders the last payment the vendor is entirely released from any obligation to convey or tender conveyance. The covenants are independent so long as no duty is imposed on the vendor, but if any covenant puts both parties to action and concurs in time, it must be

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held to be dependent and concurrent. It seems that the logical sequence of the rule allowing a forfeiture for intermediate payments without tender of performance is that the last payment should not be forthcoming until the abstract and deed are tendered, when it is so provided in the contract; for it is primary law that a failure of title will relieve the vendee. *Warvelle, Vendors*, 813.

There is nothing in the assertion that any other rule will interfere with, or destroy, or invite a breach of, the contract as the parties have made it. What we have undertaken to show is that a tender of performance when stipulated in the agreement, as well as a tender of payment, is a part of the contract; the two engagements make the contract; the one is dependent on the other.

The judgment of the lower court is affirmed.

RUDKIN, C. J., FULLERTON, MORRIS, and GOSE, JJ., concur.

[No. 8507. Department Two. December 18, 1909.]

R. H. NICHOSON *et al.*, Respondents, v. JOHN ERICKSON
et al., Appellants.¹

ATTACHMENT—DISSOLUTION—BURDEN OF PROOF. Upon motion to dissolve an attachment, attacking grounds upon which it was issued, the burden of proof is upon the plaintiff to establish one of the grounds by a fair preponderance of the evidence.

SAME—EVIDENCE—SUFFICIENCY. An attachment, granted on the ground that the defendant was about to convert his property into money and place it beyond the reach of creditors, should be dissolved, where it only appears from the plaintiff's evidence that the defendant had offered to sell the property at a price exceeding what plaintiff considered its value, and was preparing to move, and refused to sell to plaintiff and allow a credit on the amount; the defendant having denied the indebtedness *in toto*; that he refused two offers to sell his outfit at figures less than his price; only moved it a short distance, openly, and he testified he did not intend to sell.

¹Reported in 105 Pac. 836.

Appeal from an order of the superior court for Benton county, Canfield, J., entered July 13, 1909, denying a motion to dissolve an attachment, after a hearing before the court. Reversed.

L. H. Prather and C. G. Pence, for appellants.

C. O. Anderson and C. Stacer, for respondents.

DUNBAR, J.—This action was brought to recover the sum of \$1,084.86, alleged to be due for goods sold and delivered by the plaintiffs to defendants. The writ of attachment issued and was served upon defendant Erickson, and certain property taken. A writ was also issued to the sheriff of Franklin county, which was served upon defendant Lawrence. Defendant Erickson moved to dissolve this attachment, and a hearing was had and the motion was finally denied. The grounds for attachment are set forth as follows, after stating the amount claimed to be due:

“The defendants are about to convert their property into money for the purpose of placing it beyond the reach of creditors, and that the defendants are about to convert a part of their property into money, for the purpose of placing it beyond the reach of their creditors, and especially these creditors.”

The case was tried mostly upon affidavits, and some oral testimony was also given.

From an examination of the statement of facts, we are forced to the conviction that the court erred in not sustaining the motion to dissolve the attachment. The burden is upon the party plaintiff to sustain the allegations of the affidavit. It was decided by this court, in *Bender v. Rinker*, 21 Wash. 636, 59 Pac. 504, that where a motion to discharge an attachment is presented, supported by affidavits challenging the existence of the grounds upon which the attachment has issued, it becomes the duty of the plaintiff to establish one or more of such grounds by a fair preponderance of the evidence at the hearing.

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The evidence in this case, bearing upon the right of the appellants to have this motion sustained, is very brief. The first affidavit presented on the part of the respondents was that of H. J. Duffy, one of the respondents, which was to the effect that Erickson and Lawrence, who had taken the contract from the respondents to do subwork in the construction of the Lower Yakima Irrigation Company's canal, had, during their work under contract, drawn supplies from the company to the amount of \$1,084; that Erickson and Lawrence quit work, and refused to work any further for the respondents; that he offered them work at the going cash prices; that he saw Erickson and asked him if he would sell his outfit, which consisted of horses, scrapers, tents, cooking utensils, etc., and that Erickson told him he would take \$1,200 for them. Duffy also swore that he offered to buy \$35 worth of lumber from Erickson, but Erickson told him that Lawrence had sold it to another party. He said that in his opinion the outfit was worth something like \$700, and that he offered to take the same and credit on account, which Erickson refused to allow him to do; that he also made Erickson deliver up to him groceries which he had furnished him, to the amount of \$80, which he credited on the account. He states in conclusion that he does not know personally that Erickson tried to sell his property to anybody else. The only other testimony in relation to Erickson was that of one McAlpin, who stated that he rode up to Erickson's camp and asked him if he wanted to sell his outfit, and that Erickson said he would sell, and that he thought it was worth \$800; that he told him that he did not think it was worth that much, and rode away; that at that time Erickson was packing and loading to move; the witness concluding with the statement: "This is all I know about his trying to sell his property." The other testimony is in relation to Lawrence, who had left camp, taking with him his own part of the outfit, which had been attached in Franklin county and afterwards released,

so that it has no bearing on the question for determination here.

On this showing, the plaintiffs rested, and Erickson testified. He denied the indebtedness to respondents *in toto*; but claimed that there was a balance due him on their transaction, and that Duffy offered to buy his horses and give him credit on their account for \$700, which he refused. But it must be borne in mind that this account was disputed by Erickson, so that there was nothing strange in the fact that he refused to sell the outfit to the respondents and allow them to give him credit on their account. It is not disputed that Duffy offered Erickson work, and that he refused to work for Duffy any further. Neither is this surprising, considering the feeling that existed between the parties at that time over the matters in controversy between them. The only difference in the testimony of Duffy and Erickson is that Erickson said that he told Duffy that he would take \$1,000 for the outfit, instead of \$1,200 as Duffy testified. Erickson also testified that he had no further occasion to stay in the camp; that he had quit work; that it was costing him a good deal to keep his horses there, and he wanted to go where he could get something to do; that he really did not want to sell his team, although he would have done so if he could have got his price, but that he rather preferred to buy horses, as he was in the contracting business and wanted horses to work with; that after he had packed up, he took his outfit about a mile and a half to the farm of his sister-in-law, for the purpose of doing some work for her in grading and leveling, and that he was engaged in such work when the attachment was served; that his camp was about three-fourths of a mile from the camp of the respondents, and that when he moved he did so between ten and eleven o'clock in the forenoon, and went directly through the camp of the respondents, and was seen by their employees. So that it does not appear from the testimony that Erickson had made any attempt to sell his outfit, even if it could possibly be con-

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ceded that he did not have the right to do so while a contest was being waged between him and the respondents over a disputed account. The only testimony in regard to the sale, or attempted sale, at all, is that two offers were made to Erickson for the outfit, and both were refused by him.

The testimony, in our opinion, being wholly inadequate to warrant the issuance of the writ, we think the court erred in refusing to dissolve the attachment, and the judgment will be reversed, and the cause remanded with instructions to sustain the appellants' motion to dissolve the attachment.

RUDKIN, C. J., PARKER, MOUNT, and CROW, JJ., concur.

[No. 7732. Department Two. December 20, 1909.]

JOHN CATLIN *et al.*, *Appellants*, v. W. T. SHELDON *et al.*,
Respondents.¹

APPEAL—REVIEW—FINDINGS. Findings upon conflicting evidence, supported by the testimony of many witnesses, will not be disturbed on appeal where the trial court had the advantage of seeing and hearing the witnesses.

EVIDENCE—WEIGHT. Negative testimony which cannot be accounted for or explained away on the theory of mistake or lack of knowledge is entitled to the same consideration as other testimony.

Appeal from a judgment of the superior court for Kittitas county, Rigg, J., entered April 3, 1908, upon findings in favor of the defendants, after a trial on the merits before the court without a jury, dismissing an action to quiet title to water rights in a stream. Affirmed.

A. L. Slemmons, for appellants.

Carroll B. Graves and John H. McDaniels, for respondents.

¹Reported in 105 Pac. 828.

PER CURIAM.—This case involves questions of fact only. For this reason a statement of the issues presented or a review of the testimony given would be of little interest to the parties immediately concerned, and of no possible interest to the state at large. Briefly stated, the case is this: the appellants allege and contend that in the summer of 1871 one Mathias Becker appropriated and diverted from the Manash-tash creek, a mountain stream in Kittitas county, 300 inches of water, measured under a four-inch pressure according to the custom of miners, and thereafter used the same for irrigation, stock and domestic purposes, on certain lands then owned or claimed by him; that thereafter Becker, by mesne conveyances, transferred and conveyed the water rights thus acquired to the appellants, who are now the owners thereof, in fee simple, and in possession. The respondents, on the other hand, contend that no appropriation or diversion whatever was made by Becker until late in the year 1873; that only a few inches of water at best was ever applied by him to any beneficial use; that he transferred 50 inches of water from the same appropriation to one Slingsby long prior to the conveyance under which the appellants claim; that he abandoned his rights and claims, if any he ever had, etc.

The appellants' claim is supported by the testimony of Becker alone, though two other witnesses testified that they saw water in a ditch or depression through which the Becker appropriation was diverted, in the fall of 1871, and again in 1872, some few miles above the Becker place. Opposed to this is the testimony of a very considerable number of witnesses produced by the respondents.

The appellants earnestly insist that inasmuch as the witness Becker testified by deposition, this court occupies as favorable a position to weigh his testimony as did the court below, and that the opposing testimony, of a negative character, is not sufficient to overcome the direct and positive testimony of the witness Becker. This court may occupy as favorable a position as did the court below, in so far as this

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particular witness is concerned, but that court had the usual advantage in the consideration of the testimony given in open court by the witnesses for the respondents. The respondents' witnesses, from the nature of the issues presented and from the necessities of the case, testified that there was no ditch at a certain place in certain years, and that little or no water was used on the Becker place, but this fact does not destroy or impair the effect of their testimony. If a witness testifying to a negative has the same opportunity for knowing the facts testified to as has the witness who testifies to affirmative matter, so that the negative testimony cannot be accounted for or explained away on the theory of mistake or lack of knowledge on the part of the witness, the testimony of the one is entitled to the same consideration as the testimony of the other, all else being equal. Such was the case here. Many witnesses on the part of the respondents testified that there was no such ditch as that testified to by Becker, earlier than 1878, and that not to exceed a few inches of water was ever used on the Becker place from the Manashtash creek for any purpose. Their testimony showed great familiarity with the locality, and a very full and accurate knowledge of the facts in relation to which their testimony was given. Under such circumstances this court will not undertake to say that the conclusion of the trial court was erroneous. Its judgment is therefore affirmed.

[No. 8133. Department One. December 20, 1909.]

CHARLES WATSON, *Appellant*, v. JAMES SHELTON,
Respondent.¹

ATTACHMENT—DISSOLUTION—AFFIDAVITS—SUFFICIENCY. It is not error to dissolve an attachment issued on the ground that the defendant was about to convert certain real estate into money for the purpose of placing it beyond the reach of his creditors, where the affidavit for attachment was controverted by affidavit that the defendant at no time attempted to sell the property, but desired his creditors to receive the full amount to which they were entitled; as the same sufficiently denies that he was about to convert the same, etc.

Appeal from an order of the superior court for Lincoln county, Holcomb, J., entered January 19, 1909, in favor of the defendant, dissolving an attachment, after a hearing before the court. Affirmed.

Merritt, Oswald & Merritt, for appellant.

PER CURIAM.—This is an appeal from an order dissolving an attachment. The affidavit for attachment, after stating the formal matters required in such cases and particularly describing certain real property, alleged the ground of attachment as follows: "Which said real estate the defendant is about to convert into money for the purpose of placing it beyond the reach of his creditors." The affidavit in support of the motion to dissolve the attachment averred, among other things, that, "He [the defendant] has at no time attempted to sell any of his property for the purpose of placing it beyond the reach of his creditors, or at all, that he has at all times desired his creditors to receive the full amount to which they are entitled," etc. A counter affidavit filed by the appellant averred that, on the 17th day of November, 1908 (the attachment issued two days later), the respondent "Had a tentative agreement or contract, to sell the property upon

¹Reported in 105 Pac. 850.

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which the attachment was levied," etc. Based on the foregoing affidavits, the contention of the appellant is, that the respondent did not deny that he was about to convert his real property into money. We cannot agree with this contention. While the respondent did not in express terms controvert the averments of the attachment affidavit, he did deny that he at any time attempted to sell any of his property, and we fail to see how a person can convert real property into money except through the medium of a sale.

In our opinion there was a direct and explicit denial of the ground of attachment set forth in the original affidavit, and the court committed no error in the ruling complained of. The order discharging the attachment is therefore affirmed.

[No. 8125. Department Two. December 20, 1909.]

C. A. STONE *et al.*, Respondents, v. INSURANCE COMPANY OF NORTH AMERICA, Appellant.¹

PLEADING—ANSWER—AFFIRMATIVE DEFENSE—SUFFICIENCY. A so-called affirmative defense reiterating facts appearing on the face of the complaint, and challenging their legal sufficiency, is properly stricken as presenting no issue.

PLEADING—AMENDMENT—ALLOWANCE. It is not error to refuse to permit the filing of an amended answer contradicting an admission in the original answer, unless good cause is shown for the change.

INSURANCE—MARINE INSURANCE—POLICY—CONSTRUCTION. A general contract of insurance of shipments by rail within the limits of the United States and Canada, and shipments by steamers navigating coastwise and inland waters of the United States, covers a shipment from San Francisco to Bellingham and Seattle, by a steamer driven from her course by stress of weather while navigating such waters, and lost by perils of the sea, although the ship intended to stop *en route* at Victoria, a foreign port; since the policy was manifestly intended to cover losses occurring in certain well defined geographical limits.

Appeal from a judgment of the superior court for Whatcom county, Neterer, J., entered November 12, 1908, upon

¹Reported in 105 Pac. 856.

findings in favor of the plaintiffs, after a trial on the merits before the court without a jury, in an action on an insurance policy. Affirmed.

Parrott & Griswold, for appellant.

Newman & Howard, for respondents.

RUDKIN, C. J.—This was an action on an insurance policy, to recover the value of certain goods lost by the perils of the sea. So far as material to the present inquiry, the facts are as follows: On the 24th day of August, 1905, the defendant insured the plaintiffs to the amount of \$10,000 on all kinds of lawful goods and merchandise, consisting principally of electrical appliances, apparatus and supplies for electric roads, against loss or damage by fire, collision, derailment of trains or perils of the sea, for the term of one year from August 19, 1905.

In general terms the policy covered shipments by rail within the United States and Canada, and shipments by steamers navigating coastwise and inland waters of the United States, excluding the Great Lakes. Export goods were expressly excluded from the policy, and the insurance on imports did not attach until the risks assumed by the marine undertakers terminated. During the life of the policy, the plaintiffs shipped certain gas and electrical appliances and supplies of the value of \$848.11, from the Port of San Francisco to the ports of Bellingham and Seattle, by the Steamship Valencia, which sailed from the port of San Francisco on or about January 20, 1906. The Valencia encountered a storm at sea while off and before entering the Straits of Juan De Fuca, was driven against the rocks at or near Cape Beale, on the western coast of Vancouver Island, and was totally lost by the perils of the sea, together with her cargo. The case was tried before the court without a jury, and from a judgment in favor of the plaintiffs, this appeal is prosecuted.

The sufficiency of the complaint and findings to support

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the judgment is the principal question presented by the appeal, but certain preliminary questions that arose during the progress of the trial call for a passing notice. The first answer filed in the cause denied certain allegations of the complaint, admitted others, and set forth a so-called affirmative defense. This answer was withdrawn by stipulation of the parties, and a second answer was filed. The second answer admitted certain allegations of the complaint which were denied in the first answer, and set forth the same affirmative defense. The affirmative defense was stricken on motion, and leave to file a third answer, denying certain allegations of the complaint which were expressly admitted in the second answer, was refused. These rulings are assigned as error.

The so-called affirmative defense presented no issue. It simply reiterated facts already appearing on the face of the complaint and challenged their legal sufficiency to warrant a recovery. Nor was there error in the refusal of the court to permit the filing of a third answer, for the purpose of denying certain allegations of the complaint which had theretofore been expressly admitted. Amendments are always allowed in furtherance of justice, but most assuredly a court is not bound to permit a sworn admission to be converted into a sworn denial, unless some good cause for the change is shown. No such showing was made here. On the contrary, the appellant insisted upon its right to amend as a matter of course.

“As a general rule a party will not be allowed to file an amendment contradicting an admission made in his original pleadings. If it be proper in any case, it must be upon very satisfactory evidence that the party has been deceived or misled, or that his pleading was put in under a clear mistake as to the facts.” 31 Cyc. 422.

See, also, *Smith v. Equitable Mtg. Co.*, 74 Hun 26, 26 N. Y. Supp. 180; *Balch v. Smith*, 4 Wash. 497, 30 Pac. 648.

On the merits of the case the appellant contends that the lost goods were not in transit by steamers “navigating coast-

wise and inland waters of the United States" at the time of their loss, and were therefore not covered by the policy. The basis of this contention is the fact that the Valencia intended to stop at Victoria, a foreign port, on her trip from San Francisco to Bellingham and Seattle, and was, therefore, not a steamer navigating coastwise and inland waters of the United States. This contention cannot be sustained. The intention of the parties to the contract of insurance must be gathered from the contract itself, from the risks excluded as well as from the risks included. The contract expressly included shipments by rail within the limits of the United States and Canada, and shipments by steamers navigating coastwise waters of the United States. The trip by water from San Francisco to Bellingham and Seattle is over coastwise and inland waters of the United States, and is as clearly within the policy and within the intention of the parties as if referred to in express terms. The fact that the ship intended to stop at Victoria en route is, in our opinion, immaterial. Had the property been lost while in the harbor at Victoria, or after the ship had voluntarily departed from the coastwise and inland waters of the United States, a different question would arise, but the ship was en route from San Francisco to Bellingham and Seattle, plying coastwise and inland waters of the United States, and was on such waters when driven from her course by stress of weather and destroyed by perils of the sea. The policy did not insure any particular voyage or any particular ship or class of ships, and the technical question as to whether Victoria, Bellingham or Seattle was the terminus *ad quem*, or whether the ship was engaged in coastwise trade never entered into the minds of the contracting parties, was not material to the risk insured against, and should not be held controlling by the courts.

We think the parties manifestly intended to cover losses occurring within certain defined geographical limits within the period of the policy and that the loss in question was

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clearly included. *St. Paul Fire & Marine Ins. Co. v. Knickerbocker Steam Towage Co.*, 93 Fed. 931.

The judgment is affirmed.

DUNBAR, CROW, MOUNT, and PARKER, JJ., concur.

[No. 8262. Department One. December 20, 1909.]

AMELIA BATLEY, *Respondent*, v. LAURA DEWALT *et al.*,
Appellants.¹

LANDLORD AND TENANT—LEASE—ASSIGNMENT—WITHOUT CONSENT—DAMAGES—RIGHTS OF ASSIGNEE—WAIVER OF FORFEITURE. Damages cannot be recovered by the assignees of a lease by reason of the assignor's breach of her agreement to procure the written consent of the landlord, where the assignees were not disturbed in their possession and the landlord waived a forfeiture of the lease by accepting rent from the assignees after notice of the assignment.

SAME—LEASE—ASSIGNMENT WITHOUT CONSENT—WAIVER—RECEIPT OF RENTS. A landlord's acceptance of rent from assignees of the lease, after notice of the assignment, waives the right to forfeit the lease for assignment without the landlord's consent, although receipt for the rent was given in the name of the original lessees.

Appeal from a judgment of the superior court for Spokane county, Kennan, J., entered January 12, 1909, upon findings in favor of the plaintiff, after a trial on the merits before the court without a jury, in an action to foreclose a mortgage. Affirmed.

Belt & Powell, for appellants.

W. H. Plummer, for respondent.

RUDKIN, C. J.—On the 4th day of December, 1905, Henry Rombeck and wife leased to the plaintiff, Amelia Batley, and George Batley, her husband, a certain building in the city of Spokane known as the Merchants Hotel, for the term of forty-five months from the first day of December, 1905, or

¹Reported in 105 Pac. 1029.

until the 31st day of August, 1909, at the monthly rental of \$138 per month, payable monthly in advance on the first day of each and every month during the term. The lease contained the usual covenant against assigning or subletting without the written consent of the lessors.

The lessees occupied the demised premises as a lodging house until on or about the 30th day of April, 1907. On the latter date they assigned their lease for the balance of the term, and sold the furniture in the lodging house to the defendants in this action for the sum of \$3,700, \$2,500 of which was paid in cash, and the balance secured by note and mortgage due May 3d, 1908. The note and mortgage were not paid at maturity, and the present action was instituted to recover judgment on the note and to foreclose the mortgage. The answer of the defendants set up a counterclaim in the sum of \$2,000 for a breach of an alleged covenant or agreement on the part of the plaintiff and her husband to procure the written consent of the Rombecks to the assignment of the lease from the plaintiff and her husband to the defendants. Judgment was given in favor of the plaintiff according to the prayer of the complaint, and from that judgment, this appeal is prosecuted.

The refusal of the court to allow damages on the counterclaim is the only error assigned. Waiving the questions whether the respondent entered into an absolute agreement to obtain the written consent of her landlords to the assignment of the lease, or whether she only agreed to use her best endeavors in that behalf, and whether oral testimony was competent to prove such an agreement in the face of the written contract of the parties, we fail to see wherein the appellants have suffered any substantial damage by reason of the breach, or wherein there has been any substantial breach. It is an admitted fact that the appellants entered into the immediate possession of the demised premises on the assignment of the lease, and continued to occupy the same without let or hindrance from any source up to the very day

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of the trial, some twenty months later. Nor is there anything in the record to indicate that their possession would be interfered with in any way during the remainder of the term which has now expired. Furthermore, the Rombecks waived the right to declare a forfeiture of the lease by their conduct in accepting rent from the assignees of the term with full knowledge of the assignment. The covenant against assignments was broken as soon as the assignment was made, and the Rombecks had the option to declare a forfeiture or recognize the assignees as their tenants. As soon as they accepted rent in advance from the assignees, with full knowledge of all the facts, the right to declare a forfeiture was waived as fully and completely as by the written consent provided for in the lease itself. Such is the rule announced by this court, and the rule is amply supported by authority. *Pettygrove v. Rothschild*, 2 Wash. 6, 25 Pac. 907; *Cuschner v. Westlake*, 43 Wash. 690, 86 Pac. 148; 18 Am. & Eng. Ency. Law (2d ed.), p. 385; Taylor, Landlord & Tenant (9th ed.), §§ 287, 412.

Nor could the landlord relieve himself from the effect of the waiver by accepting rent from the assignees, and giving a receipt in the name of the original tenants. *Darmstaetter v. Hoffman*, 120 Mich. 48, 78 N. W. 1014, cited by the appellants, is not in conflict with these views, for there the court said:

“But in this case the lessors have not consented to the assignment. There is nothing in the record to indicate that they had any knowledge of it, or had done any act which could operate as a waiver of the covenant in the lease not to assign. Until Hubbard & King had assented in writing, or had recognized defendant as their tenant, that relation did not exist.”

As we have seen, the original landlords here did have notice of the assignment and did recognize the appellants as their tenants by accepting rent from them in advance with full

knowledge of the grounds of forfeiture. For these reasons there is no error in the record, and the judgment is affirmed.

FULLERTON, CHADWICK, MORRIS, and GOSE, JJ., concur.

[No. 8167. Department Two. December 20, 1909.]

BARTLETT ESTATE COMPANY, *Respondent*, v. FAIRHAVEN
LAND COMPANY *et al.*, *Appellants*.¹

APPEAL—DECISIONS — REMAND — PROCEEDINGS BELOW — PAYMENTS ADMITTED PENDING APPEAL. Where, on appeal, a case is remanded with directions to enter a judgment of foreclosure upon a certain debt, it was proper, where it was admitted that payments were made pending the appeal, for the court to determine the amount to be credited by reason of such payments, although they might have been credited on the judgment as well as upon the debt before the judgment directed by the mandate.

JUDGMENT—MATTERS AND PARTIES CONCLUDED—PRIVIES. Where, on a former appeal, it was determined that the whole mortgage debt had become due by a default and declaration of the assignee, and the case was remanded for judgment for the whole debt, it is proper to deny an intervention by one acquiring an interest pending the appeal and seeking a marshaling of the assets on allowing certain credits; since he was a privy bound by the judgment.

Appeal from a judgment of the superior court for Whatcom county, Neterer, J., entered January 5, 1909, in favor of the plaintiff, after a trial on the merits before the court without a jury, in an action to foreclose a mortgage upon real estate. Affirmed.

Black & Black, for appellants.

Newman & Howard, for respondent.

MOUNT, J.—This is the second appeal in this case. When it was here before we determined that the trial court had erred in not entering a decree for the entire debt, in allowing a release of certain premises, and in fixing the attorney's fee

¹Reported in 105 Pac. 846.

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based on a foreclosure for a part of the debt. The case was therefore remanded to the lower court with the following directions:

"The judgment appealed from is reversed, and the cause remanded with instructions to enter the usual judgment foreclosing the mortgage for the entire mortgage debt, disallowing the application to release the tract known and described in the mortgage as the Old Colony Wharf strip, and allowing to the plaintiff a reasonable attorney's fee based on the recovery of the entire mortgage debt." *Bartlett Estate Co. v. Fairhaven Land Co.*, 49 Wash. 58, 94 Pac. 900.

The case was here upon a complete record, and was not remanded for a new trial. When the case was remitted to the lower court, counsel for the plaintiff filed a motion for a decree in accordance with the mandate. In this motion it was alleged that certain payments had been made without prejudice upon the debt, by the payment of certain collateral notes held as security in addition to the mortgage, which payments had been made pending the appeal, and were proper credits on the debt, and that no other payments had been made. The defendant Fairhaven Land Company then filed an answer to this motion, denying that no other payments had been made. The answer also contained two alleged affirmative defenses, the first alleging a tender of \$11,381 before maturity of one of the notes, thereby cancelling the lien thereof, and the second affirmative defense alleging a transfer of certain of the property by the mortgagor to third parties. The answer prayed for a credit of said \$11,381, and for a marshaling of assets. The trial court, upon motion, struck out the affirmative matter. The appellant E. M. Wilson applied to intervene in the action, alleging that he had purchased a part of the mortgaged premises while the appeal was pending, and prayed that the sum of \$11,381 be credited upon his purchase, and that the assets be marshaled. This application was denied. The court thereupon heard evidence upon the credits alleged to have been made, and found the whole amount thereof and the amount due upon the mortgage. The court

also fixed the attorney's fee at \$6,500, upon the evidence as introduced in the original case, and a decree was entered accordingly. The Fairhaven Land Company and E. M. Wilson, who attempted to intervene, have appealed from that decree.

When the case was remanded to enter judgment foreclosing the mortgage for the entire mortgage debt and to allow the plaintiff a reasonable attorney's fee based on the recovery of the entire debt, the duty of the trial court was plain. This did not mean that the case was to be again tried, or that further evidence was to be taken. It meant that all the issues in the case had been determined, and that a decree should be entered as directed without further hearing. It was, no doubt, proper practice, when it was conceded that payments had been made upon the debt after the appeal had been taken, to give credit for such payments before the judgment was entered. But these credits might just as well have been given upon the judgment, and where there was any dispute as to the correct amount of such credits, it was the duty of the court to try that question and determine the amount to be credited, whether the credits were to be made upon the debt before judgment or upon the judgment itself. The parties in this case sought to have the credits made upon the debt before the judgment was entered. This was done, and, in our opinion, was properly done under the mandate.

One of the questions on the other appeal was whether the whole debt became due on account of the failure of the debtor to pay certain installments, and we held that the whole debt was due and that the assignee had the same right as the mortgagor to declare the whole debt due. It is not claimed that the tender of \$11,381 was made upon one of the notes prior to such declaration. The tender was, as a matter of fact, made after the action was begun, and was therefore too late, because the decision in the other appeal determined the time of the maturity of the note upon which the tender was made and the time of maturity of the whole debt, and also

determined the right of appellant and privies claiming under it to litigate that question further. Mr. Wilson also acquired his interest in the mortgaged property while the appeal was pending. He acquired with notice, and is therefore a privy bound by the judgment against his grantor. 23 Cyc. 1253. It is clear therefore that the court properly struck out the further answers of the appellant and properly denied the intervention. There was substantially no dispute upon the items which the court gave credit for upon the debt.

There is no merit in any of the points presented on this appeal, and the judgment is therefore affirmed.

RUDKIN, C. J., DUNBAR, CROW, and PARKER, JJ., concur.

[No. 8232. Department Two. December 20, 1909.]

**BARTLETT ESTATE COMPANY, *Respondent*, v. FAIRHAVEN
LAND COMPANY *et al.*, *Appellants*.¹**

MORTGAGES—FORECLOSURE—EXECUTION SALES—METHOD. Bal. Code, § 5288, providing that sales on execution shall be by the acre, is directory, and does not require land to be sold one acre at a time; one bid upon a tract of a certain number of acres will be construed as a bid at so much per acre, and is not a substantial irregularity.

SAME—MODE OF SALE—PERSONS ENTITLED TO BID ON PARCEL. Laws 1899, p. 87, § 4, providing that real property shall be sold under execution separately when a portion is claimed by a third person and requires it to be sold separately, refers to persons claiming adversely to the mortgagor or mortgagee, and not to persons acquiring an interest *pendente lite* with notice of the suit.

SAME—WAIVER OF RIGHT. Persons attending a foreclosure sale, who had made a written request for the separate sale of portions of the mortgaged property, waive their right to a separate sale by remaining silent at the sale when the sheriff asked "if there was any particular piece" desired to be sold separately; notwithstanding that the sheriff had replied to the written request in writing stating that he would sell as directed by the decree, as the same was not such a denial of the request as would excuse attendance and oral demand at the sale.

¹Reported in 105 Pac. 848.

SAME—METHOD OF SALE—DETERMINATION BY COURT—CONFIRMATION—RIGHT TO OBJECT. Where a decree of foreclosure directed that the various tracts of land be sold in parcels as described in the mortgage, it must be presumed that the court determined that such method of sale would bring the highest price within Laws 1899, p. 87, § 4, directing a sale "separately or otherwise as is likely to bring the highest price"; and no objection being made to the judgment, objection cannot be made to confirmation by parties or privies because the sheriff did not sell in smaller tracts.

SAME—SEPARATE PARCELS—APPURTENANCES. Where a mortgage and decree described certain tracts of upland by metes and bounds, "together with the leases" of the harbor area fronting thereon, the leases are appurtenant to the upland, and may be sold as one tract with the abutting upland.

SAME—DISCRETION OF SHERIFF—IRREGULARITIES. Where no request is made for the sale of mortgage premises in separate tracts, and the decree ordered the property sold in parcels as described in the mortgage, it is not a substantial irregularity for the sheriff in his discretion to sell several of the tracts in one parcel.

SAME—SALES FOR CASH—COMPETITION. Under Bal. Code, § 5291, requiring sales of real estate under execution to be sold to the "highest bidder who shall forthwith pay the bid to the officer" the announcement at a sale, advertised to be for cash, that the sheriff would not take checks or anything of that kind is not unfair as preventing competitive bids.

Appeal from an order of the superior court for Whatcom county, Kellogg, J., entered April 21, 1909, confirming a sale of mortgaged property pursuant to a decree of foreclosure, after a hearing before the court. Affirmed.

Black & Black, for appellants.

Newman & Howard, for respondent.

MOUNT, J.—This appeal is from an order confirming the sale of mortgaged land pursuant to a decree of foreclosure. The decree and order of sale directed "such property to be sold in separate parcels according to the separate descriptions of such property contained in such mortgage." The mortgage debt amounted to something over \$137,000. This debt was secured by a mortgage upon several different parcels of land. Some of these parcels were described as city

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lots, others were described by metes and bounds, and still others by legal subdivisions of section, township, and range. The decree set forth the different parcels and lots as they were described in the mortgage. Prior to the sale but after the notice thereof had been published, several persons, claiming to have purchased certain portions of the property *pendente lite*, gave written notice to the sheriff that they had purchased such portions of the property, each of such portions being less than the whole of any one parcel thereof as described in the mortgage and decree, and requested the sheriff to sell such portions separately. The sheriff replied to each of these requests in writing, that he would sell the property as directed in the decree. At the time of the sale the sheriff announced:

"Now, gentlemen, this property we intend to sell for cash and all those bidding are supposed to have the cash here. We are not taking any checks or anything of that kind. How do you gentlemen want this sold? In one block? Any particular piece that you want sold? If not, I will follow the decree of the court. I will commence to sell it."

The property was then offered for sale parcel by parcel as described in the mortgage and decree, until the platted town lots were reached, when a bidder offered to bid on such lots separately. The lots were then offered and sold separately. At the sale the sheriff did not, after the offer first above stated, offer any portion of any tract as he had been requested by written notice to do, and no further request therefor was made at the sale. The property sold, except the town lots, was made up of large tracts, and was not offered by the acre. It was bid in by the plaintiff, no other person offering bids thereon. After the return of the sale was made, the defendant in the action and E. M. Wilson, Alfred L. Black and Ada F. Black, his wife, Alfred L. Black, Hugh Eldridge, and D. B. Edwards, claiming to be successors in interest of the defendant, objected to confirmation of the sale upon the grounds that the sheriff failed, (1) to sell

by the acre; (2) to sell portions of property claimed by the objector; (3) that he sold two parcels as one tract, and (4) that the refusal of the sheriff to take checks prevented competitive bidding. The trial court overruled all these objections and entered an order confirming the sale. The appeal is from that order. We shall consider these points in the order stated.

(1) It is true that Bal. Code, § 5288, provides that "all lands except town lots shall be sold by the acre." This, however, does not mean that the land shall be sold an acre at a time. It means that bids shall be at so much per acre. If this provision is still in force, it is merely directory. If a tract of forty acres of land were sold for \$400, the court would construe such sale as being by the acre, and such bid as meaning by the acre at \$10 per acre. This court has held that it was within the discretion of the sheriff to sell lands *en masse* or in parcels, and such sale would be confirmed where no substantial irregularity is shown. *Otis Bros. & Co. v. Nash*, 26 Wash. 39, 66 Pac. 111. A bid for a whole tract is not a substantial irregularity even though not made by the acre, for the bid would be construed as so meant.

(2) The statute under which the sale was made provides:

" . . . and when the sale is of real property, consisting of several known lots or parcels, they shall be sold separately or otherwise as is likely to bring the highest price, or when a portion of such real property is claimed by a third person, and he requires it to be sold separately, such portion shall be sold separately." § Bal. Code, § 5276; Laws 1899, p. 87, § 4.

We are of the opinion that the third persons here referred to are such persons as claim adversely to the mortgagor and mortgagee, and such as acquire interests in the mortgaged property after the mortgage but before action is brought to foreclose. Such persons, no doubt, are entitled to a direction in the decree of foreclosure that the portions claimed by them shall be sold separately. *Solicitors Loan & Trust Co. v. Washington & Idaho R. Co.*, 11 Wash. 684, 40 Pac. 344. In

this case the objectors other than the defendant acquired their rights *pendente lite* with notice of the action to foreclose; in fact after the original decree had been entered. They, therefore, became privies to the defendant, and were as much bound by the decree as if they had been parties from the beginning, and have no greater right to object to the decree in regard to the method of sale than the original defendants. The decree ordered the property sold in parcels as described in the mortgage. No objections were made to this part of the decree. It must be presumed, therefore, that the court tried out that question and decided that such method of sale was likely to bring the highest price. If this question was one to be determined by the sheriff at the time of the sale, and not to be determined by the court at the trial of the case as some courts seem to hold, and if these objectors were third persons within the meaning of the statute, we are still of the opinion that, when the sheriff at the beginning of the sale stated: "How do you gentlemen want this sold? In one block? Any particular piece that you want sold? If not, I will follow the decree of the court," it was then the duty of these objectors at that time to require the sheriff to offer specified portions separately, and when they failed to accept the offer of the sheriff to sell particular pieces separately, they must be held to have waived the privilege which the statute gave them. When the written request was made upon the sheriff to sell certain specified portions separately, he did not deny the request, but stated that he would at the sale "comply with the mandate of such execution and decree." This was not such a denial of the request as would relieve the parties from attending the sale or, if present, in remaining silent when they were asked if there was "any particular piece that you want sold."

(3) Certain of the tracts of upland were described in the mortgage and decree by metes and bounds, followed by the words "together with the leases heretofore issued by the state of Washington to the harbor area in front of and abutting

upon said described premises." It is claimed by the objectors that these leasehold interests in the harbor area in front of the upland are separate interests from the upland, and constituted two parcels, and that the two parcels should have been sold separately, and that, because they were sold as one tract, the sale should not have been confirmed. It is not claimed that any demand was made for separate sale of these particular tracts. The harbor area leases were clearly appurtenant to the upland; but, assuming that they were separate tracts, the decree authorized the sale thereof as one parcel, and no substantial irregularity appears, and therefore, under the rule in *Otis Bros. & Co. v. Nash, supra*, the sale was properly confirmed.

(4) The sale was advertised to be for cash. The statute provides that such sale shall be made to the "highest bidder who shall forthwith pay the bid to the officer." Bal. Code, § 5291. There is no merit therefore in the appellants' contention that the announcement of the sheriff that "we are not taking any checks or anything of that kind" was unfair or prevented competitive bids.

We find no error in the record. The order appealed from is therefore affirmed.

RUDKIN, C. J., CROW, PARKER, and DUNBAR, JJ., concur.

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[No. 8147. Department Two. December 23, 1909.]

THE STATE OF WASHINGTON, *Respondent*, v. E. T.
MONTGOMERY, *Appellant*.¹

CRIMINAL LAW—TRIAL—MISCONDUCT OF PROSECUTOR—WITNESSES—TESTIMONY OBTAINED BY DURESS. It is prejudicial error for the prosecuting attorney, after the prosecuting witness had denied the charges against the defendant, to state in the presence of the jury that the witness had made many contrary statements to him and had been tampered with and bought, to examine the witness at length as to the statements, which the witness admitted having made but insisted were false and obtained by duress, and finally, after temporarily excusing the witness, to state to her that she could be imprisoned for perjury; and evidence given by her against the defendant thereafter is obtained by duress and cannot sustain a conviction.

CRIMINAL LAW—TRIAL—DUTY OF PROSECUTOR. The prosecuting attorney is a *quasi* judicial officer and it is his duty to see that one accused of a public offense is given a fair trial.

Appeal from a judgment of the superior court for Spokane county, Huneke, J., entered July 10, 1908, upon a trial and conviction of the crime of rape. Reversed.

Merritt, Oswald & Merritt, for appellant.

Fred C. Pugh and *V. T. Tustin*, for respondent.

RUDKIN, C. J.—The appellant was convicted of the crime of rape on a female child under the age of 18 years, and prosecutes this appeal from the final judgment of the court. Numerous errors are assigned, in the admission and exclusion of testimony, in the giving and refusing of instructions, and in the failure of the court to instruct the jury in writing; but few, if any, of these rulings are likely to occur on a retrial, and for that reason we deem it unnecessary to discuss or consider them at this time. Nor do we find it necessary to review the testimony, further than to say that it is sufficient to sustain the verdict, if believed by the jury. But

¹Reported in 105 Pac. 1035.

whether the appellant was guilty or innocent he was entitled to a fair and impartial trial, according to the forms of law, and we are constrained to hold that this right was denied him.

The prosecuting witness, a girl of the age of 15 years, was taken into custody about three months before the trial, and was confined in the juvenile detention room from the time of her arrest until after the trial. She was called as a witness for the state at the opening of the trial, and testified that the appellant never had sexual intercourse with her at any time or place. The prosecuting attorney thereupon stated to the court, in the presence of the jury, that the witness had stated the contrary to him many, many times; that the witness had been tampered with, and bought, etc. He was then permitted to ask the witness leading questions. In answer to such questions the witness freely admitted that she had told the prosecuting attorney that the appellant had sexual intercourse with her on three different occasions, but insisted that she was frightened into making such statements. The prosecuting attorney was then permitted, over the objection and protest of the appellant, to interrogate the witness at length, relative to statements she had made wherein she admitted that the appellant had sexual intercourse with her at different times and places, with all the details and attendant circumstances. The witness admitted the making of all such statements, but insisted that they were absolutely false. She was thereupon withdrawn from the stand, to be recalled some hours later. After leaving the stand, she was first taken to the prosecuting attorney's office, and thence to the detention room and placed in charge of the matron. Before leaving her, the prosecuting attorney told her that he could send her to the penitentiary for perjury, and after he left, the matron told her that she would find the prosecuting attorney a very good friend but a very powerful enemy. The witness herself testified that the matron interceded with the prosecuting attorney in her behalf and asked him not to send her to jail.

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The respondent contends that the prosecuting attorney and the matron only insisted that the witness should speak the truth, but the record shows only too clearly that the witness was given plainly to understand that her testimony given in the morning was not true, and that she should adhere to and reaffirm the statements made to the officers before the trial. The record clearly shows, also, that the witness was put under duress, and that her testimony was not voluntarily given when she took the stand the second time and testified against the appellant.

Notwithstanding the foregoing facts, the respondent earnestly insists that the weight of the testimony of this witness was for the jury, in the light of all the surrounding circumstances, and that this court may not interfere with the verdict. We readily concede that the weight of testimony is ordinarily for the jury, but this case presents the far more important question, whether a prosecuting attorney may threaten and intimidate witnesses, and place testimony obtained by duress before a jury, against one accused of a public offense. The duty of such officers has often been defined by the court.

In the *Appeal of Nicely* (Pa.), 18 Atl. 737, the court said:

“The district attorney is a *quasi* judicial officer. He represents the commonwealth, and the commonwealth demands no victims. It seeks justice only,—equal and impartial justice,—and it is as much the duty of the district attorney to see that no innocent man suffers as it is to see that no guilty man escapes. Hence, he should act impartially. He should present the commonwealth’s case fairly, and should not press upon the jury any deductions from the evidence that are not strictly legitimate.”

In *Hurd v. People*, 25 Mich. 404, Christiancy, C. J., said:

“The prosecuting officer represents the public interest, which can never be promoted by the conviction of the innocent. His object, like that of the court, should be simply justice; and he has no right to sacrifice this to any pride of

professional success. And however strong may be his belief of the prisoner's guilt, he must remember that, though unfair means may happen to result in doing justice to the prisoner in the particular case, yet, justice so attained, is unjust and dangerous to the whole community."

In *Biemel v. State*, 71 Wis. 444, 37 N. W. 244, the court said:

"He is an officer of the state, provided at the expense of the state, for the purpose of seeing that the criminal laws of the state are honestly and impartially administered, unprejudiced by any motives of private gain, and holding a position analogous to that of the judge who presides at the trial. Such is the view taken of the office of prosecuting attorney by the courts of this country as well as England, and we think it is the true view of his position."

"It is the duty of the prosecuting attorney to treat the accused with judicial fairness; to inflict injury at the expense of justice is no part of the purpose for which he is chosen. Unfortunately, however, we sometimes meet with cases in which these officers appear to regard themselves as the counsel for the complaining party rather than the impartial representatives of public justice." Cooley, *Constitutional Limitations* (7th ed.), p. 440, note 2.

See, also, *Curtis v. State*, 6 Cold. (Tenn.) 9; *March v. State*, 44 Tex. 64; *Gandy v. State*, 24 Neb. 716, 40 N. W. 302.

The conduct of the prosecuting attorney on the trial of this case did not measure up to these requirements. His statement, in the presence of the jury, that the prosecuting witness had been tampered with and was bought was both prejudicial and unwarranted. After the prosecuting witness had admitted that she had made contradictory statements out of court, her further examination as to the details of these statements, to the effect that the appellant had sexual intercourse with her at different times and places, with all the attendant circumstances, could have no other object than to bring these extra judicial statements before the jury, to the manifest prejudice of the accused, and such a result must have been intended. Furthermore, courts of common law

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have always excluded confessions extorted from prisoners, because, as said by Judge Cooley, the common law "recognized fully the dangerous and utterly untrustworthy character of extorted confessions, and was never subject to the reproach that it gave judgment upon them." Cooley, Constitutional Limitations, p. 442.

If extorted confessions are dangerous and utterly untrustworthy in character, is not extorted testimony open to the same objection? In *State v. McCullum*, 18 Wash. 394, 51 Pac. 1044, this court condemned the practice of extorting confessions from persons accused of crime by confining them in dark cells until a confession was wrung from them, and we must now add our condemnation to the practice of extorting testimony from witnesses by like means or by threats or duress of any kind. Such acts are declared criminal in some states, and public officers are not exempt from their provisions. *Gandy v. State, supra*. While it is important that the appellant should be punished for his crime if guilty, it is of far greater importance that settled principles designed for the protection of life and liberty should not be overthrown; and if persons accused of crime cannot be convicted without using against them testimony wrung from unwilling witnesses by threats of criminal prosecution and imprisonment, it is better far that they should go free than that such practices should receive the sanction and approval of the courts.

It is not our purpose to condemn the zeal manifested by the prosecuting attorney in this case. We know that such officers meet with many surprises and disappointments in the discharge of their official duties. They have to deal with all that is selfish and malicious, knavish and criminal, coarse and brutal in human life. But the safeguards which the wisdom of ages has thrown around persons accused of crime cannot be disregarded, and such officers are reminded that a fearless, impartial discharge of public duty, accompanied by a spirit of fairness toward the accused, is the highest commendation they can hope for. Their devotion to duty is not measured,

like the prowess of the savage, by the number of their victims. Believing that the appellant was not accorded a fair and impartial trial in the court below, the judgment is reversed and a new trial ordered.

PARKER, DUNBAR, CROW, and MOUNT, JJ., concur.

[No. 8337. Department Two. December 23, 1909.]

JOHN O'CONNOR *et al.*, *Appellants*, v. JOHN ENOS,
Respondent.¹

PLEADING—AMENDMENTS—TRIAL—STIPULATED FACTS. Upon a trial upon stipulated facts, the complaint is deemed amended to conform to the stipulation.

FRAUDS, STATUTE OF—ORAL LEASES. An oral lease entered into in May, 1904, for the cropping season of 1905, is void by reason of the statute of frauds.

SAME—ORAL LEASE—PART PERFORMANCE. Taking possession of land under an oral lease for the next season, plowing, cultivating, and summer fallowing the land, is such part performance as to take the same out of the operation of the statute of frauds.

COVENANTS—AGAINST ENCUMBRANCES—BREACH—LEASE. The unexpired term of a valid lease, subsisting at the date of the execution of a deed, is an encumbrance and a breach of covenants of warranty, and entitles the grantee to damages.

COVENANTS—AGAINST ENCUMBRANCES—NOTICE OF—ESTOPPEL. Notice of an outstanding lease does not estop the grantee from recovering damages for breach of covenants against encumbrances.

EVIDENCE—PAROL—TO VARY COVENANT. Parol evidence is inadmissible to show an exception which would destroy a plain unambiguous covenant against encumbrances.

JUDGMENTS — MATTERS CONCLUDED — COVENANTS — ACTIONS — DEFENSES. A judgment against grantees in their unsuccessful attempt to recover possession of the granted premises from tenants of the grantor in possession, does not show that there was no breach of warranty by reason of the unexpired lease, where the court held that there were additional reasons why the plaintiffs could not recover in that action.

¹Reported in 105 Pac. 1039.

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COVENANTS—AGAINST ENCUMBRANCES—MEASURE OF DAMAGES. Upon a breach of covenant of warranty against encumbrances by reason of an unexpired lease, the measure of damages is the rental value of the premises during the withholding.

SAME—EXPENSES INCURRED—ESTOPPEL. Upon a breach of covenant of warranty against encumbrances by reason of an unexpired lease, the grantee cannot recover the costs incurred in a prior action to recover possession, where the court held in that action that they were estopped by their own acts to maintain that action, such judgment being conclusive.

COVENANTS—BREACH—ACTION — DEFENSES — ESTOPPEL. The fact that grantees are estopped by their own acts to recover possession of the granted premises, does not prevent recovery from the grantor of damages for breach of covenant against encumbrances by reason of an unexpired lease.

Appeal from a judgment of the superior court for Spokane county, Huneke, J., entered July 3, 1909, upon findings in favor of the plaintiffs, upon an agreed statement of facts, in an action for breach of covenant against incumbrances. Reversed.

Merritt, Oswald & Merritt, for appellants.

Charles P. Lund, L. R. Hamblen, and W. S. Gilbert, for respondent.

RUDKIN, C. J.—On the 5th day of November, 1904, the defendant, John Enos, conveyed to the plaintiff Gertrude O'Connor a section of land in Lincoln county for the consideration of \$12,000. The deed of conveyance contained the following covenants of warranty:

“And the said John Enos, a bachelor, party of the first part, for his heirs, executors and administrators, does covenant with the said party of the second part, his heirs and assigns, that he is well seized in fee simple of the lands and premises aforesaid, and has good right to sell and convey the same in manner and form aforesaid; that the same are free from all encumbrances. And the above bargained and granted lands and premises, in the quiet and peaceful possession of the said party of the second part, his heirs and as-

signs, against all persons lawfully claiming, or to claim, the whole or any part thereof, the said party of the first part will warrant and defend."

The present action was instituted to recover damages for breach of the covenant against encumbrances contained in the foregoing deed, and the case was submitted to the court below on an agreed statement of facts, the material parts of which are as follows:

"That prior to the said conveyance, and in the month of May, 1904, the defendant entered into an oral agreement with one J. W. Oliver, by the terms of which the said J. W. Oliver was to have the possession of and the right to farm said lands for the farming season of 1905, and said Oliver was to pay as rental therefor one-third of all of the grain harvested from said land during said season, to be delivered to the said defendant in sacks, upon said land, and thereafter said Oliver entered into an agreement with one C. C. Elliott, by which said Elliott was to have the use of part of said land for the crop year of 1905.

"That pursuant to said agreements the said Oliver and Elliott, in the summer of 1904, entered upon and took possession of about 400 acres of said land, plowed and cultivated the same, and put said land in condition to be seeded to wheat, and at the time of the conveyance by said defendant to the plaintiffs said 400 acres of land was summer fallowed and ready to be seeded to wheat in the spring of 1905.

"That in December, 1904, plaintiffs leased said real estate to Bell Brothers, who attempted to take possession of said lands, but were prevented by the said Oliver and Elliott, who were in and withheld the possession thereof, claiming the right to possession under said oral agreement with the defendant, as aforesaid; that upon the failure of the said Bell Brothers to obtain possession of said lands, said lease given them by plaintiffs was cancelled, and said plaintiffs made no further attempt to regain possession of said lands, except to commence an action against the said Oliver and wife and Elliott and wife, as hereinafter stated.

"That after said Oliver and Elliott had refused to permit said Bell Brothers to take possession of said lands, and on the — day of April, 1905, the plaintiffs instituted an action in the superior court of the state of Washington, in and

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for the county of Lincoln, against J. W. Oliver and wife, for the possession of said real estate, and thereafter filed an amended complaint therein making C. C. Elliott and wife defendants therein.

"Issue was joined in said action by the answers of the defendants, Oliver and Elliott, and the reply of the plaintiffs, and the defendants therein were enjoined from harvesting and removing said crop on said real estate; thereafter said defendants furnished a bond, and by reason thereof were permitted, by the court, to harvest and remove said crop; that said action thereafter came regularly on for trial, it being contended by the plaintiffs herein that it was understood at the time of the conveyance of said real estate to plaintiffs that the arrangement with said Oliver and Elliott was that, in the event the defendant herein should sell said real estate prior to the time the same was seeded in the spring of 1905, the said defendant was to pay said Oliver and Elliott for the summer following thereof, and deliver possession immediately to such purchaser, and that the plaintiffs were to have the possession of said real estate upon the execution of said conveyance, while on the other hand it was contended by said Oliver and Elliott that at the time of the said conveyance it was understood and agreed between the parties to this action that the said Oliver and Elliott were to seed said land and have the use and occupancy of the same for the crop year of 1905 and that by reason thereof the plaintiffs herein were not to have the possession of said land until after said crop of the year 1905 had been removed.

"That the defendant herein had knowledge and notice of the commencement of said action against the said Oliver and wife and Elliott and wife, aforesaid, was present at the trial thereof, and testified on behalf of said defendant upon the issues raised.

"That no demand upon said Oliver and Elliott for the possession of said lands was made after said Bell Brothers were prevented by said Oliver and Elliott from taking the possession thereof, as shown in paragraph VI hereof, and that no steps or proceedings in connection therewith, except to commence said action referred to, was had or taken.

"That the prosecution of said action in the superior court of Lincoln county, and the supreme court of the state of Washington, the plaintiffs were compelled to and did expend

as costs, expenses and attorney's fees therein, the sum of \$1,000, the items of said expense being more specifically enumerated in the statement attached to the amended complaint in this action, marked Exhibit B.

"That a fair, reasonable rental value of the use and occupation of said real estate for and during the season of 1905 was and is the sum of \$1,800.

"That in December, 1904, and again in February, 1905, Bell Brothers went to said real estate to take possession thereof under their lease with plaintiffs, and at said times they were informed by said Oliver that the arrangement between the defendants herein and said Oliver was that said Oliver was to have the use and occupation of said land for the farming year of 1905, and that said Oliver and said Elliott intended to hold possession of said land, seed it in the spring of 1905, and that said Bell Brothers would not be permitted to have possession thereof during said year, which said information so given to Bell Brothers by said Oliver was communicated to plaintiffs by said Bell Brothers."

On the foregoing facts the court gave judgment for the defendant, and the plaintiffs have appealed.

The respondent earnestly insists that the complaint does not state facts sufficient to constitute a cause of action, for the reason that it fails to allege or show a breach of the covenant against encumbrances. If we were to eliminate from the complaint the allegations in reference to the judgment referred to in the foregoing statement—and the appellants earnestly insist that that judgment cannot be considered—there is little left in the complaint to show a breach of the covenants of warranty. But be that as it may, the case was submitted to the court on an agreed statement of facts, and such statement largely superseded the pleadings. In other words, under the established practice in this state, the complaint must be deemed amended to conform to the stipulated facts.

Do the stipulated facts show a breach of the covenant against encumbrances? If the appellants' case rested on the oral lease alone, manifestly they do not, for that lease was

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unquestionably void by reason of the statute of frauds. But the agreed statement shows that the tenants took possession under their oral lease, and plowed, cultivated and summer fallowed the land long prior to the execution of the deed. Such acts on their part constituted part performance and took the oral lease out of the statute. 1 Taylor, Landlord & Tenant (9th ed.), § 32; Frye, Specific Performance of Contracts (3d ed.), p. 291 *et seq.*; 28 Am. & Eng. Ency. Law (2d ed.), p. 56, and cases cited. We are therefore of opinion that there was a valid subsisting lease on the premises at the date of the execution of the deed, and all the authorities agree that the unexpired term of such a lease constitutes an encumbrance. *Fritz v. Pusey*, 31 Minn. 368, 18 N. W. 94; *Clark v. Fisher*, 54 Kan. 403, 38 Pac. 493.

If there was an encumbrance against the land at the time of the execution of the deed the appellants are entitled to recover damages for its breach, unless they are estopped to maintain such action by some act of their own. The mere fact that the appellants had notice of the outstanding lease at the time they accepted the deed would not work an estoppel. *West Coast Mfg. & Inv. Co. v. West Coast Imp. Co.*, 25 Wash. 627, 66 Pac. 97, 62 L. R. A. 763. Nor was parol testimony admissible to destroy the covenant. The covenant is plain and free from ambiguity, and if the grantor is at liberty to show by oral testimony that the conveyance was subject to one encumbrance he may show that it was subject to others, and thus entirely destroy his solemn contract. *Clark v. Fisher*, *supra*; *West Coast Mfg. & Inv. Co. v. West Coast Imp. Co.*, *supra*, and cases cited.

It is questionable whether the record and judgment in the action prosecuted by the appellants against the tenants to recover possession of the granted lands was competent or admissible on this hearing. In *Anderson v. Bigelow*, 16 Wash. 198, 47 Pac. 426, it was held that a similar judgment was no evidence in an action for a breach of covenant, and that the grantor's knowledge of the pendency of such prior action

or his presence at trial as a witness would not change the rule. That case was reaffirmed in *Cullity v. Dorffel*, 18 Wash. 122, 50 Pac. 932. But if we are permitted to examine the judgment in that case, it fails to show that there was no breach of warranty. The court there simply held that there were other and additional reasons why the appellants here could not recover in that action. For these reasons we are of opinion that the appellants are entitled to recover for the breach, and that the measure of damages is the reasonable rental value of the premises during the time they were withheld. *Fritz v. Pusey, supra*.

The appellants further contend that they are entitled to recover the costs and expenses incurred in the prior action, amounting to the sum of \$1,000. In the determination of this question, at least, we may look to the judgment and pleadings in the action in which the expenses were incurred. An examination of the record in that case shows that the court ruled that the appellants were estopped to maintain the action by their own conduct, and that adjudication is final and conclusive here. If the appellants were estopped to maintain the action, regardless of the existence or validity of the lease, it was their own folly to attempt it, and the respondent should not be charged with the expenses thus incurred.

We will add in conclusion that there is no inconsistency between the claim of estoppel and the claim that an encumbrance existed. For if there was in fact an encumbrance, the appellants are entitled to recover damages for its breach, although they might be unable to recover the premises from the tenants in possession on other grounds and for other reasons. The judgment is reversed, with directions to enter judgment in favor of the appellants for the sum of \$1,800 with interest and costs of suit.

PARKER, DUNBAR, CROW, and MOUNT, JJ., concur.

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[No. 8361. Department Two. December 23, 1909.]

SECURITY SAVINGS SOCIETY, *Respondent*, v. SEWELL T.
COLLINS, *Appellant*.¹

PROCESS—SERVICE BY PUBLICATION—FILING SUMMONS. The original summons for publication need not be filed, but jurisdiction is conferred by the publication and proof of service, under Bal. Code, § 4882, providing that the proof of services shall consist of the affidavit of the publisher and a printed copy of the summons.

SAME—PUBLICATION—SUFFICIENCY OF SUMMONS. A summons for publication requiring the defendant to appear in the alternative within sixty days after service, or within sixty days after the first publication, which was stated, while not to be commended, sufficiently complies with Bal. Code, § 4878.

Appeal from a judgment of the superior court for Spokane county, Sullivan, J., entered October 13, 1908, upon findings in favor of the plaintiff, in an action to quiet title based upon a tax deed and sale. Affirmed.

Roche & Onstine and *F. W. Girard*, for appellant.

Post, Avery & Higgins and *P. C. Shine*, for respondent.

RUDKIN, C. J.—The appellant in this action attacks the validity of a tax judgment and tax sale upon two grounds; first, because the original summons for publication was not filed in the foreclosure action; and, second, because the published summons itself is defective.

(1) Bal. Code, § 4877, prescribes when service by publication may be made; the next section prescribes the form of summons and the manner of publication, and § 4882, provides that the proof of service by publication shall consist of the affidavit of certain designated persons, together with a printed copy of the summons as published. There is no requirement that the original summons shall be filed, and we

¹Reported in 105 Pac. 1034.

cannot understand why the jurisdiction of the court should depend upon such filing. It is not the original summons, but the publication and proof of service that confers jurisdiction.

(2) The summons cited the defendants in the tax case to appear "within sixty days after the service of this notice and summons upon you, exclusive of the day of service, or within sixty days after the first publication of this notice and summons, exclusive of the day of said first publication, to wit, within sixty days after the 30th day of June, 1904." It is claimed that this summons is indefinite and uncertain because two different return days are given. First, sixty days after the date of the first publication; and, second, sixty days after the service, which means sixty days after the last publication.

It is to be regretted that attorneys cannot follow the plain language of the statute in matters of this kind, but the object of service is to notify the defendant to appear and defend, and if that object is accomplished the law is satisfied. The statute provides that the summons shall contain the date of the first publication, and shall require the defendant or defendants upon whom service by publication is desired, to appear and answer the complaint within sixty days from the date of first publication. Bal. Code, § 4878. The notice in question was manifestly intended for both personal service and service by publication. The provision requiring the defendants to appear within sixty days after the service of the notice or summons upon them refers exclusively to personal service, while the notice in the alternative as clearly refers to service by publication only. The form of summons is not to be commended, but we do not think that a person of ordinary prudence could fail to understand what was intended. If the defendant was personally served the summons clearly stated when he should appear, and if served by publication the return day was equally explicit.

We are therefore of opinion that the court had jurisdiction in the tax foreclosure proceeding, and such being the

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fact the judgment must be affirmed, regardless of the question of *res judicata* discussed in the briefs.

PARKER, DUNBAR, CROW, and MOUNT, JJ., concur.

[No. 8283. *En Banc*. December 23, 1909.]

SAVAGE-SCOFIELD COMPANY, *Appellant*, v. THE CITY OF
TACOMA *et al.*, *Respondents*.¹

MUNICIPAL CORPORATIONS — IMPROVEMENTS — ASSESSMENTS — REBATES—ORDINANCES—CONSTRUCTION. A "rebate" allowed to "owners of the property" assessed for the pavement of a street, required by an ordinance to be paid into the city treasury by a street railway company to cover the cost of paving between tracks subsequently laid in the street, refers to the owners at the time the assessment was paid, under a strict construction of the statute; and a subsequent purchaser of a lot has no interest in the rebate.

Appeal from an order and judgment of the superior court for Pierce county, Shackleford, J., entered June 19, 1909, and June 21, 1909, upon sustaining a demurrer to the complaint, dismissing an action to recover a rebate on an assessment paid for a local improvement. Affirmed.

Marshall K. Snell, Bertha M. Snell, and E. F. Freeman,
for appellant.

T. L. Stiles, Frank R. Baker, and F. A. Latcham, for
respondents.

DUNBAR, J.—The amended complaint on which appellant has elected to stand in this case, after alleging its corporate existence, the official capacity of the defendants, etc., sets forth that the city of Tacoma, by ordinance and amendments thereto, granted to E. J. Felt certain franchises over the streets of Tacoma, for street railway purposes; that the city

¹Reported in 105 Pac. 1032.

of Tacoma had passed a certain ordinance, the material part of which was as follows:

"That hereafter when any street covered by this franchise shall have been paved before the laying of tracks under this franchise, before commencing any work on such streets, for the laying of tracks, the said grantee, his successors or assigns, shall pay into the city treasury the cost of the pavement on the part of said streets which is covered by the franchise between the tracks, between the rails, and for two feet outside of the outside rails of the track or tracks; and said sum so to be paid shall be determined by *pro-rating* the cost of said portion of said street in proportion to the original cost of the entire pavement on such street, and said sum shall be paid to the city treasurer and by the city treasurer and controller rebated to the owners of the property where the special assessment against the property affected thereby shall have been paid," etc. Ordinance of Tacoma, No. 2,768.

The complaint sets up the fact that lots 1 and 2 in block 704, New Tacoma, were included in the special improvement district No. 255, of the city of Tacoma, and were duly assessed their proportionate share, to wit, \$1,107.35, of the cost of paving South Seventh street in said city; that one William Jones and wife had been the owners of the property; that negotiations had been pending between Jones and wife and Savage & Scofield for a sale of this property; that under the contract the buyer was to assume a mortgage of \$2,500, which was on the property; that the purchase price of the property was to be \$40,000; that out of the \$2,000 which was paid over at the time of the execution of the contract, the assessment levied against the said lots for the paving done on South Seventh street was paid out of said \$2,000; that the transaction was afterwards completed, and that the warranty deed was received by the purchasers in due time. The complaint then sets forth the subsequent payment to the city of Tacoma by the traction company, as the assignee of E. J. Felt, of the proportionate cost of the pavement, amounting to \$190.80; and the claim is made that, by reason of the foregoing, the sum of \$190.80 became due and

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owing plaintiff as the owner of said property. Demand was made for the same, which was refused, and this action was brought.

The defendants interposed separate demurrers, which were to the effect, (1) that the court has no jurisdiction of the actions against each defendant, which demurrer was overruled by the court; and (2) that the amended complaint did not state facts sufficient to constitute a cause of action, which demurrer was sustained by the court on the last proposition. Plaintiff electing to stand on its amended complaint, action was dismissed, and judgment was rendered against plaintiff for costs, from which order and judgment this appeal is taken.

There are some questions discussed by learned counsel in this case which, under the view we take of the merits of the case, it is not necessary for us to notice, as we think it is best to determine this case upon its merits, so that any further litigation on the subject may be foreclosed. We may assume from the contract pleaded in the complaint that this assessment was paid out of Jones' money, and not out of the money belonging to the appellant. In fact, in its recapitulation on the last page of its brief, the appellant says, in so many words, that the complaint shows that appellant's grantors were the owners and paid the assessment.

But it is contended by the appellant that the court erred in its construction of the ordinance above quoted, which is the material question in this case. Many authorities are cited to support principles which cannot be questioned, viz: That the intent of the ordinance controls its construction; that it is presumed that words and phrases used in an ordinance or statute are used therein in their familiar and popular sense; and that in construing statutes the particular inquiry is, not what is the abstract force of words or terms used or what they may comprehend, but in what sense they were intended to be used, etc. But admitting the principles announced, it seems to us that they are not controlling in

this case, for a strict construction of this ordinance, which is contended for by the appellant, would do violence to its evident meaning and would result in injustice. The evident object of the ordinance was to make restitution. This means, to restore. The money could only be restored to the person to whom it properly belonged and who had once had possession of it. The appellant says that the latest dictionaries of the English language define the word "rebate" to mean, "to draw back"; "to discount"; "to make a reduction from a gross or normal amount or sum."

Accepting the common use of the word "rebate"—"to draw back," one cannot draw back something which he never put forward, and it would be doing more violence to the plain meaning of words to hold that the word rebate as used in this ordinance has reference to a stranger who had never given or put forth the amount in question, than it would be to hold that the word "owner" as used in the ordinance had reference to the person who was owner at the time that the money was paid into the treasury instead of the person who happened to be owner at the time when the rebate was due. In passing the ordinance, the council was evidently considering the ordinary case where the owner at the time the assessment was paid would be the owner at the time of the payment into the treasury by the contractor. It is evident that a case of this kind did not occur to them, or they would have made provision for the special cases. Counsel says that the ordinance makes no reference to the person who paid the assessment, and therefore it must be that it was the intention that the money should follow the lot. But the rebate has to be paid to some one. It is not possible to pay it to the lot. That some one is the owner of the lot. So that the question again comes back to the proposition of what owner was contemplated by the ordinance. It seems so plain to our minds that Savage-Scofield Company has no interest whatever in this rebate that it is a little difficult to discuss the proposition.

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We think the court did not err in refusing to place the strict construction upon the ordinance which was claimed for it by the appellant, and the judgment will therefore be affirmed.

RUDKIN, C. J., MORRIS, CROW, and PARKER, JJ., concur.

[No. 8338. Department Two. December 24, 1909.]

MARY SMITH, *Respondent*, v. W. L. SMITH, *Appellant*.¹

APPEAL—REVIEW—HARMLESS ERROR. Error in the admission of evidence in a divorce case is harmless, where the findings are sustained by competent evidence.

COSTS—ON APPEAL—DIVORCE—ATTORNEY'S FEES. Upon affirming a decree of divorce in favor of a wife, the attorney's fees on appeal will be confined to the statutory costs.

Appeal from a judgment of the superior court for Spokane county, Huneke, J., entered May 26, 1909, upon findings in favor of the plaintiff, in an action for a divorce. Affirmed.

W. M. Nevins and Merritt, Oswald & Merritt, for appellant.

Robertson, Miller & Rosenhaupt, for respondent.

PER CURIAM.—This is an appeal from a decree in a divorce proceeding. The case involves, with one exception, pure questions of fact. The statement of facts consists of between six and seven hundred pages of portrayal of domestic infelicity, which it would be neither edifying nor instructive to set forth in detail, or at all. But an examination of all the testimony in the case convinces us that the judgment of the court was justified in respect to all of the contested questions, viz., the granting of the decree, the disposition of the children, and the division of the property. In relation to the

¹Reported in 105 Pac. 1030.

exception above mentioned, the appellant assigns as error the action of the court in refusing to sustain objections to certain testimony which, it is claimed, was not justifiable under the issues raised by the pleadings.

But in addition to the fact that the record discloses that the alleged obnoxious testimony was not objected to until the testimony was substantially received, this case is tried here *de novo*, and excluding all illegal testimony, we think there is quite sufficient left to sustain the judgment. It will therefore be affirmed. The motion of appellant for costs for attorney's fees in this court, over and above the statutory fees, will be denied.

[No. 8339. Department Two. December 27, 1909.]

ROBERT L. DALKE, *Appellant*, v. W. C. SIVYER, *Respondent*.¹

BROKERS—COMMISSIONS—EFFICIENT CAUSE OF SALE. A broker is not entitled to recover part of a commission agreed upon between him and defendant, another broker, where it appears that the defendant had the property listed for sale at \$50,000, and agreed to divide commissions with plaintiff if a sale was made to plaintiff's prospective customer, whose name was given to defendant, and who made an offer of \$42,000 through another broker who also had the property listed for sale, which offer was accepted by the owner; since it does not appear that plaintiff was the efficient cause of the sale.

Appeal from a judgment of the superior court for Spokane county, Kennan, J., entered April 29, 1909, upon findings in favor of the defendant, in an action to recover a broker's commissions, after a trial before the court without a jury. Affirmed.

O. C. Moore, for appellant, cited: *Hovey & Brown v. Aaron*, 133 Mo. App. 573, 113 S. W. 718; *Hoadley v. Savings Bank of Danbury*, 71 Conn. 599, 42 Atl. 667, 44 L. R. A. 321; *Ice v. Maxwell*, 61 W. Va. 9, 55 S. E. 899;

¹Reported in 105 Pac. 1031.

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Oliver v. Katz, 131 Wis. 409, 111 N. W. 509; *Hubachek v. Hazard*, 83 Minn. 437, 86 N. W. 426; *French v. McKay*, 181 Mass. 485, 63 N. E. 1068; *McMillan v. Beves*, 147 Fed. 218; *Carnes v. Finigan*, 198 Mass. 128, 84 N. E. 324; *Howe v. Werner*, 7 Colo. App. 530, 44 Pac. 511; *Martin v. Silliman*, 53 N. Y. 615; *Lloyd v. Matthews*, 51 N. Y. 124; *Schlegal v. Allerton*, 65 Conn. 260, 32 Atl. 363; *Wood v. Wells*, 103 Mich. 320, 61 N. W. 503; *Jennings v. Trummer*, 52 Ore. 149, 96 Pac. 874; *Elmendorf v. Golden*, 37 Wash. 664, 80 Pac. 264; *McCormack v. Henderson*, 100 Mo. App. 647, 75 S. W. 171; *Tinsley v. Scott*, 69 Ill. App. 352; *Glade v. Eastern Illinois Min. Co.*, 129 Mo. App. 443, 107 S. W. 1002; *Crane v. McCormick*, 92 Cal. 176, 28 Pac. 222. The fact that the sale was made to a purchaser without knowing that the purchaser was procured through the instrumentality of the broker is immaterial. 4 Am. & Eng. Ency. Law (2d ed.), 979, 980; *Lawson v. Black Diamond Coal Min. Co.*, 53 Wash. 614, 102 Pac. 759; *Barnes v. German Savings & Loan Society*, 21 Wash. 448, 58 Pac. 569; *Von Tobel v. Stetson & Post Mill Co.*, 32 Wash. 683, 73 Pac. 788; *Butler v. Kennard*, 23 Neb. 357, 36 N. W. 579; *Craig v. Wead*, 58 Neb. 782, 79 N. W. 718; *Rounds v. Alee*, 116 Iowa 345, 89 N. W. 1098; *Bowe v. Gage*, 132 Wis. 441, 112 N. W. 469, 12 L. R. A. (N. S.) 265.

Charles P. Lund, *L. R. Hamblen*, and *W. S. Gilbert*, for respondent, cited: *Frink v. Gilbert*, 53 Wash. 392, 101 Pac. 1088, and cases cited. *Ayres v. Thomas*, 116 Cal. 140, 47 Pac. 1013; *Votaw v. McKeever*, 76 Kan. 870, 92 Pac. 1120; *Babcock v. Merritt*, 1 Colo. App. 84, 27 Pac. 882.

PER CURIAM.—Briefly stated, the controlling circumstances in this case are about as follows: Edward H. Blake, living in Bangor, Maine, owned lots 15 and 16, of block 101, of Third addition to Railroad addition to Spokane Falls, and W. C. Sivyer, the respondent, was the agent of the owner, and had the property listed for sale at the price of \$50,000.

About the 1st of March, the appellant, Robert L. Dalke, a real estate broker in Spokane, went to the office of the respondent, and told him that he had a prospective buyer for these lots, and asked Sivyer if he would divide his commission with him if he should make a sale to this prospective purchaser. Sivyer agreed to do so, Dalke testifying that he was to have two-thirds of the commission, and Sivyer that he agreed to give him only one-half of the commission. Otherwise their testimony was not greatly different. Both of them testified that Dalke told Sivyer that his prospective purchaser's name was Linney, and that he gave Mr. Sivyer a card with Linney's name on it. Sivyer also told Dalke that the owner would probably discount the property for five per cent for cash, and that that would be probably the lowest price.

It seems that Linney was an acquaintance of another real estate broker in Spokane, by the name of George M. Colburn; that he passed backwards and forwards between the offices of these two agents for several days, conferring with both of them, and also with other real estate agents in Spokane. Colburn also had this property listed for sale, and had it so listed when the offered price was \$40,000. This, Linney ascertained from Colburn, and he instructed Colburn to offer \$42,000 for the land. Colburn thereupon repaired to Sivyer's office and asked him if he thought it would be worthwhile to make such an offer to Blake. Sivyer thought it would not, but Colburn asked him to telegraph the offer to Blake, and said that he—Colburn—would pay the expenses of the telegram. At the same time he paid down \$1,000 in money, or gave his check for that amount, as earnest money. As Sivyer testifies, to his surprise Blake accepted this proposition, and in due course the sale was made to Linney. It does not appear that, at the time this proposition was made and accepted, Sivyer knew who the purchaser was, the \$1,000 being paid by Colburn. The next day after the offer was accepted, Linney told Dalke that he had bought this prop-

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erty of Colburn. Dalke demanded his commission of Sivyver, which was refused, and this action was brought to recover the same.

It is well established that an agent or owner cannot list property with a broker and, after such broker has procured a purchaser for the land at the agreed price, sell said land himself to said purchaser and refuse to divide the commission with the broker; this on the theory that he will not be allowed to appropriate to his own benefit the time, enterprise, or energy of the broker. It is also well settled that, where the owner or agent lists property with different brokers for sale, the contracts not being exclusive, the brokers run a race of energy for the prize, viz., the commission; that they enter into a competition in this respect, and that no matter how much effort or time a broker may have expended in attempting to make a sale, he cannot complain if his competitor reaches the goal before he does by securing a purchaser who is ready, able, and willing to purchase. This, however, is a peculiar case, and we have not been able to find one exactly like it in all the cases reported. It is contended by the appellant that the law is that if defendant, while plaintiff's authority to sell stood unrevoked, chose to sell the property, either in person or through another agent, to a customer procured by the efforts of plaintiff, for a less price than that which plaintiff was authorized to offer, that would be his privilege; but that he should not be permitted to reap the fruits of plaintiff's labor and then deny him his just reward. *Hovey v. Aaron*, 133 Mo. App. 573, 113 S. W. 718, is cited to sustain this principle. In that case, the court quoted from *Hogan v. Slade*, 98 Mo. App. 44, where it was said:

"If the owners chose to close a deal to Hogan's customer, Greenwood, through other agents and at a lower price than was named to Hogan, while the latter's agency was unrevoked and he was still working with his customer at the price named to him, they must pay Hogan his commission; otherwise, any real estate agent who had borne the burden and

heat of the day in working up a sale might have his reward snatched from him at the eleventh hour by his principal empowering some one else to sell at a smaller price."

These two cases, together with *Holland v. Vinson*, 124 Mo. App. 417, 101 S. W. 1181, have some tendency to support appellant's contention. But in all those cases there was this distinguishing feature that it appeared that the plaintiff in each case was the efficient cause in procuring the purchaser; and that was the rule laid down by this court in *Elmendorf v. Golden*, 37 Wash. 664, 80 Pac. 264. In *Hovey v. Aaron*, *supra*, the court said: "Plaintiffs' evidence very strongly tends to show that they were employed by defendant and that their efforts were the procuring cause of the sale to Braley." This was the turning point in the decision of that case; and so with the other cases, and all other cases that we have been able to find on this question.

But in this case it does not appear from the testimony, even of the appellant, that he was the procuring and efficient cause, or any cause at all. It is true that he showed this property to Linney, the purchaser, but it is also true that Colburn had shown him the property, and talked with him about it, and had urged him to purchase it, as the appellant had. While it is unfortunate that a man should be placed in the position in which appellant was—for it is apparent that he would be unable to reap the fruits of endeavor when he was undertaking to sell a property for \$50,000 which somebody else was authorized to sell for \$42,000—yet, the testimony is free of any suggestion that there was collusion between Sivyer and the purchaser or his agent to in any way overreach the appellant. It was a circumstance which might occur under the custom which seems to prevail of allowing different agents to list the same property, and when the agent does consent to list property, knowing that others are engaged in the same business, he must naturally expect that exigencies of this kind will arise. Sivyer had this property for sale. It was his duty in the interest of his client to sell

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it if he could, and when the proposition was made to him by Colburn, it was his duty to submit that proposition to the owner. When the owner accepted it, it can readily be seen that it would have embarrassed the situation and might have led to the prevention of the sale, if he had made known to Dalke the situation before the sale was completed. This being, as we have said, an incident which might reasonably arise under the custom prevailing, and the respondent having acted in good faith and having divided the commission with the agent who, at all events, brought forward the purchaser who consummated the deal by paying the purchase price, we think that the appellant was without remedy, and the judgment will be affirmed.

[No. 8289. Department One. December 27, 1909.]

ANGELA CARROLL *et al.*, *Appellants*, v. WASHINGTON WATER
POWER COMPANY, *Respondent*.¹

APPEAL—PRESERVATION OF GROUNDS—EXCEPTIONS. One general exception to each and every one and every part of all the instructions is insufficient, under Bal. Code, § 5053, to secure a review of the instructions on appeal.

Appeal from a judgment of the superior court for Spokane county, Huneke, J., entered June 18, 1908, upon the verdict of a jury rendered in favor of the defendant, in an action for personal injuries sustained by a passenger in alighting from a street car. Affirmed.

Kenyon & Setters and *Nuzum & Nuzum*, for appellants.

H. M. Stephens, for respondent.

RUDKIN, C. J.—This is an appeal from a judgment in favor of the defendant in an action to recover damages for personal injuries. The errors assigned are all based upon

¹Reported in 105 Pac. 1026.

the instructions of the court, and the only exception taken to the instructions is contained in the following words at the foot of the charge: "The plaintiff wishes to, as a matter of precaution, take exception to each and every word, sentence, subdivision, phrase, and each and every of the various allegations and instructions given by the court, and each and every one of the instructions given by the court to the jury." The instructions to which the foregoing exception was taken are twenty-five in number, covering twenty-six pages of the transcript and thirty-seven pages of the respondent's brief. The correctness of but seven of these twenty-five instructions is challenged by the appellants. The statute in force at the time of the trial of this action provided as follows:

"Exceptions to a charge to a jury, or to a refusal to give as a part of such charge instructions requested in writing, may be taken by any party by stating to the court, after the jury shall have retired to consider of their verdict, and, if practicable, before the verdict has been returned, that such party excepts to same, specifying by numbers of paragraphs or otherwise the parts of the charge excepted to, and the requested instructions the refusal to give which is excepted to; whereupon the judge shall note the exceptions in the minutes of the trial, or cause the stenographer (if one is in attendance) so to note the same." Bal. Code, § 5053.

If the purpose of an exception is to direct the attention of the trial court to the claim of error, to the end that the error may be corrected, what effect can be given to the exception reserved in this case? No error was pointed out; no error was even claimed, as the exception was taken as a matter of precaution only. This question has been before this court repeatedly, and we have uniformly held that such exceptions are of no avail. *Meeker v. Gardella*, 1 Wash. 139, 23 Pac. 337; *Cunningham v. Seattle Elec. R. Co.*, 3 Wash. 471, 28 Pac. 745; *Maling v. Crummey*, 5 Wash. 222, 31 Pac. 600; *McDonough v. Great Northern R. Co.*, 15 Wash. 244, 46 Pac. 334; *Shoemaker v. Bryant Lumber & Shingle Mfg. Co.*, 27 Wash. 637, 68 Pac. 380; *State v. Vance*, 29 Wash. 435,

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70 Pac. 34; *Sterrett v. Northport Min. & Smelting Co.*, 30 Wash. 164, 70 Pac. 266; *Gallamore v. Olympia*, 34 Wash. 379, 75 Pac. 978; *State v. Katon*, 47 Wash. 1, 91 Pac. 250. A similar rule prevails, where general blanket exceptions are taken to the findings of fact, in actions tried before the court without a jury. *Fender v. McDonald*, 54 Wash. 130, 102 Pac. 1026, and cases cited.

For the reasons stated, we cannot review the errors assigned on the instructions, and the judgment is accordingly affirmed.

CHADWICK, GOSE, MORRIS, and FULLERTON, JJ., concur.

[No. 8066. Department One. December 27, 1909.]

THE STATE OF WASHINGTON, *Respondent*, v.
M. C. McCORMICK, *Appellant*.¹

INTOXICATING LIQUORS — SALE — STATUTES — CONSTRUCTION. Bal. Code, § 7313, prohibiting the sale of "intoxicating or spirituous" liquors to minors, does not mean "intoxicating spirituous" liquors; and includes beer as an intoxicating though not a spirituous liquor.

SAME—SELLING LIQUOR TO MINORS—INFORMATION—DUPLICITY. A complaint charging the sale of beer to four minors on a certain date is not duplicitous as charging four offenses, the reasonable inference being that the beer was sold jointly to all the parties named at one time and as one transaction.

CRIMINAL LAW—TRIAL—VERDICT—FORM. A verdict finding the defendant guilty as charged in the "information" is not prejudicially erroneous from the fact that the trial was upon a "complaint," where the two words were used interchangeably throughout the trial; the form prescribed by Bal. Code, § 6961 being only directory.

INTOXICATING LIQUORS—SALE TO MINORS—EVIDENCE—SUFFICIENCY. The evidence is sufficient to support a conviction for selling liquor to a minor, although the minor and bartender testified there was no sale, where the state's witness testified that the sale was made in his presence and he knew that it was beer from its appearance and smell, the credibility of the witnesses and weight of the evidence being for the jury.

¹Reported in 105 Pac. 1037.

SAME—CONSENT OF PARENT—PRIMA FACIE CASE. In a prosecution for selling liquor to a minor without the "written permission of his parent," evidence by the father that he had not consented is sufficient to make a *prima facie* case, without evidence as to his mother's consent.

SAME—CONSENT OF PARENT. The burden of proving parental consent as a justification for the sale of liquor to a minor "without the written permission" of the parents, in violation of Bal. Code, § 7313, is upon the defendant.

SAME—ISSUES AND PROOF—INSTRUCTIONS. Upon a complaint for the sale of liquor to four minors, where the state elected to proceed upon the sale to one only, an instruction authorizing a conviction upon the sale to any one of them, is error, but is without prejudice where immediately followed by an instruction confining the jury to the sale to the one as to whom the election was made, and the trial proceeded, and there was no evidence of any other sale.

SAME. A sale of intoxicating liquors to one minor, will warrant a conviction on an information for a sale to two or more.

SAME—SALE MADE "KNOWINGLY." A sale of liquor to minors is made "knowingly," within Bal. Code, § 7313, if the barkeeper making the sale knew, or by reasonable diligence should have known, that the purchaser was a minor.

WITNESSES—CROSS-EXAMINATION—IMPEACHMENT. Upon a prosecution for selling liquors to a minor, in which the minor denied buying beer of the defendant on the day in question, it is proper impeachment to ask on cross-examination whether he had been drinking that evening.

Appeal from a judgment of the superior court for Chelan county, Grimshaw, J., entered January 20, 1909, upon a trial and conviction of selling intoxicating liquors to a minor. Affirmed.

A. H. Mohler and Reeves & Reeves, for appellant.

Fred Kemp and Ludington & Kemp, for respondent.

Gose, J.—The appellant was tried and convicted in the justice court of Chelan county, upon a complaint charging him with having sold intoxicating liquors to a minor. Upon an appeal to the superior court of that county, he was again found guilty. From a judgment entered on the verdict, he prosecutes this appeal.

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Opinion Per Goss, J.

The complaint charges that, on or about September 12, 1908, in the county of Chelan, this state, the defendant unlawfully and knowingly sold intoxicating liquors, to wit, beer, to four minors, naming them, without the written consent of their parent or guardian. It is first alleged that the information does not charge any crime or offense. The code, Bal. Code, § 7313, provides that "every person who shall knowingly sell or give to a minor intoxicating or spirituous liquors without the written permission of the parent or guardian of such minor shall, on conviction thereof, be fined," etc. The precise objection urged is that, construing the statute strictly, the word "spirituous" is definitive of the word "intoxicating," and that the statute should be construed as meaning that the sale of "spirituous, intoxicating liquors" only is forbidden, and that beer is not a spirituous liquor. The suggestion is somewhat ingenious, but in our opinion without merit. The language of the statute is simple and its meaning plain. Interpretation cannot clarify it, and it should not be permitted to confuse or obscure it. The legislature has used the words disjunctively, and it is not the business of the court, by interpretation, to rewrite the statute.

It is contended that, if the complaint charges an offense at all, it charges four offenses. In support of this assignment, reference is made to Bal. Code, § 6844, which provides that, "the indictment or information must charge but one crime." This is ground for demurrer (Bal. Code, § 6896), and no demurrer was interposed; but we will treat the objection as having been properly raised.

In *State v. Butts*, 42 Wash. 455, 85 Pac. 33, the information charged that two persons named therein stole two hundred and fifty posts, the property of B, and one hundred posts, the property of P. There, as here, it was urged that two offenses were charged. The court held, however, that the reasonable inference was that all the posts were taken at one time, constituting but one crime. The reasonable inference in this case is that the beer was sold jointly to all

the parties named, at one time and as one transaction. *Black, Intoxicating Liquors*, § 517; *Dukes v. State*, 79 Ga. 795, 4 S. E. 876; *Hall v. State*, 87 Ga. 233, 13 S. E. 634. The point is not well taken.

The verdict found the defendant guilty of selling intoxicating liquors to Stanley Nagley "as charged in the information." The language of the verdict is criticised, (1) because the case was tried on a complaint and not upon an information, and (2) because the state, at the close of its case, elected to stand on the sale on September 12, 1908, whilst the complaint charged that the sale was made on or about that date. The first objection is without merit. The words "complaint" and "information" were used interchangeably throughout the trial, and no prejudice resulted to the appellant therefrom. In support of the second ground of the objection, it is said that the code (Bal. Code, § 6961), provides a form of verdict. The language of the statute clearly shows that the form prescribed is only directory. It is further urged in this behalf that the verdict should conform strictly to the state's election. We will refer to this point later in discussing an objection to one of the court's instructions.

It is contended that the evidence is insufficient to support the verdict, and it is argued that only one witness testified to the sale, whilst the barkeeper and Nagley testified that there was no sale, and that the testimony of the state's witness is unreasonable. He testified, however, that on September 12, 1908, the appellant's bartender in his presence sold beer to young Nagley. On cross-examination he said that he knew from its appearance and "smell" that it was beer. The testimony was competent, and the jury evidently believed it and rejected the testimony of the appellant's witnesses. The credibility and veracity of the several witnesses were for the jury to determine, and we cannot review the evidence for the purpose of determining its weight where there is competent evidence to support the verdict.

The father of Stanley Nagley testified that he had not

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consented to the sale. It is urged that it was the duty of the state to prove that the young man's mother had not consented. The language of the statute is "without the written permission of the parent." We think the evidence was sufficient to make a *prima facie* case. Furthermore, the burden of proving the parental consent was on the appellant if he desired to justify on that ground. Black, Intoxicating Liquors, § 53.

Error is assigned on the failure of the court to instruct the jury that "before you can find the defendant guilty, you must find from the evidence beyond a reasonable doubt that on September 12, 1908, Stanley Nagley purchased beer of Mr. Huff at defendant's saloon, and that said beer was intoxicating." The court instructed:

"(3) You will notice that the complaint alleges that intoxicating liquor was sold to four different persons on September 12, 1908. It is not necessary for the state to prove a sale jointly or severally to each and all of these four persons. If a sale of intoxicating liquor was made to one of the persons named, at the time, and place, and under the conditions charged in the complaint it is sufficient.

"(4) The prosecution has elected to rely on the alleged sale to Stanley Nagley, and before you can bring in a verdict of guilty in this case you must be satisfied from the evidence beyond a reasonable doubt that the sale alleged in the information was in fact made to Stanley Nagley, at the time and place, and under the conditions, alleged in the complaint; and it is not sufficient to show, merely, that a sale was made to the other persons named in the complaint. In other words, you are to try this case as though Stanley Nagley were the only person to whom it is alleged intoxicating liquor was sold,"

and further, in substance, instructed that the state was required to prove a sale on or about September 12, 1908. The instructions read together, as they must be, clearly informed the jury that the question for them to determine was whether a sale was made to Stanley Nagley on or about September 12. The state having elected to rely upon a sale made on

September 12, and appellant having shaped his defense to meet the sale on that date only, the instruction would be erroneous if it were not for the fact that, when read in the light of the evidence, it is without prejudice. A sale to one minor will warrant a conviction on an information charging a sale to two or more. *Hall v. State, supra*. Black, Intoxicating Liquors, p. 517. The only sale shown was on September 12. This is made clear by the last question propounded by the state's counsel to the prosecuting witness. The question was: "I do not remember whether I covered it clearly, but Mr. Frease, at the times you have testified to as seeing the boys drinking as mentioned in this complaint, was that all on the night of the day alleged in the information—September 12, 1908? Ans. Yes, sir."

Complaint is made that the court committed error in defining the word "knowingly." In substance, the court said to the jury that the sale was made knowingly within the meaning of the statute, if the appellant's bartender knew or, in the exercise of reasonable prudence should have known, that Nagley was a minor at the date of the alleged sale. The word was correctly defined. *State v. Constantine*, 43 Wash. 102, 86 Pac. 384, 117 Am. St. 1043.

Stanley Nagley testified that he did not buy beer or other intoxicating liquors of appellant on September 12. On cross-examination, against the objection of the appellant, he said that he had been drinking that evening. This is assigned as error. The inquiry was proper as touching the memory of the witness as to what occurred on that evening, and as a circumstance tending to impeach his testimony. Other minor questions presented in the brief do not merit separate consideration.

We have found no error in the record, and the judgment will be affirmed.

RUDKIN, C. J., FULLERTON, CHADWICK, and MORRIS, JJ., concur.

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Opinion Per RUDKIN, C. J.

[No. 8206. Department One. January 4, 1910.]

FRANK L. CROSBY, *Respondent*, v. U. G. WYNKOOP *et al.*,
Appellants.¹

VENDOR AND PURCHASER—TITLE OF VENDOR—SUFFICIENCY. A contract to furnish "a good title shown by abstract," is not performed, and the vendee is not compelled to accept the title, where the vendors claimed under a deed from certain persons claiming to be heirs of another, who died many years ago without administration on her estate, and there was nothing of record to show who were her heirs at law except the *ex parte* affidavit of her husband.

SAME—CONTRACT—PERFORMANCE—FAILURE OF TITLE. Upon failure of the vendors to make a title good, under a contract of sale providing that if the title is not good or cannot be made good in ten days the contract shall be null and void and all payments made refunded, the purchaser is entitled to a return of purchase money, but cannot recover damages for breach of contract to convey.

SAME—FAILURE OF TITLE—MEASURE OF DAMAGES. The measure of damages for breach of a contract of sale by reason of failure of the vendor's title, is the purchase price paid with interest, where the vendor acted in good faith and without intentional fault.

Appeal from a judgment of the superior court for Pierce county, Clifford, J., entered January 5, 1909, upon the verdict of a jury rendered in favor of the plaintiff, for \$1,000, in an action on contract. Reversed and a new trial ordered unless \$900 is remitted.

Walter M. Harvey, for appellants.

Loveday, Kelley & McMillan, for respondent.

RUDKIN, C. J.—This action was instituted to recover damages for a breach of the following contract of sale:

"Received from Frank L. Crosby the sum of One Hundred Dollars (\$100), as earnest money, and part payment for the following described premises, situate in the county of Pierce, state of Washington to wit: The Southeast quarter (SE $\frac{1}{4}$) of the Northeast quarter (NE $\frac{1}{4}$), and the South half (S $\frac{1}{2}$)

¹Reported in 106 Pac. 175.

of the Northeast quarter (NE $\frac{1}{4}$) of the Northeast quarter (NE $\frac{1}{4}$) of Section Twenty-two (22) in Township Twenty-one (21) North of Range three (3) East of the Willamette Meridian, containing (60) acres of land this day sold to the said Frank L. Crosby, for the sum of Six Thousand Dollars (\$6,000), the balance of Fifty-nine Hundred Dollars (\$5900) to be paid as follows: The sum of Two Thousand Nine Hundred and Fifty Dollars on or before twenty days from this date, and Two Thousand Nine Hundred and fifty dollars on or before one year from this date. Deferred payments to bear interest at 6 per cent per annum until paid, and upon full settlement as stated above, I agree to deliver a bond for deed, conveying good title free from all encumbrances, as shown by a complete abstract of title, certified by a responsible abstracter, to be furnished by me, on or before ten days from this date, and to be examined by the said purchaser within ten days thereafter. If said abstract does not show such title, or cannot be made to do so within ten days from notice of defects, then this agreement to be void, and all payments hereunder shall be refunded. Otherwise, if the said purchaser refuses to complete the purchase in accordance with the terms hereof, all payments made shall be forfeited as commissions and compensation for examining property, abstract, and papers; but such forfeiture shall not impair the right of either party to pursue the usual remedies for breach of this contract."

From a judgment in favor of the plaintiff in the sum of \$1,000, the present appeal is prosecuted.

There is little controversy over what we deem the material facts. Within ten days after the execution of the contract, the vendors delivered to the purchaser a complete abstract of title certified by a competent abstracter. This abstract did not show good title in the vendors, nor could the title be made good within ten days from notice of defects. The land was originally patented to John Meeker, as the head of a family consisting of himself, his wife Elizabeth, and a daughter Margaret, pursuant to the sixth article of the treaty concluded on the 26th day of December, 1854, between Governor Stevens and the chiefs, headmen and delegates of certain Indian tribes, including the Puyallups. The appellants claim

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title under a deed from John Meeker and certain persons claiming to be the heirs of Elizabeth Meeker, his wife, who died many years ago. There was no administration upon the estate of Elizabeth Meeker, and nothing of record to show that the appellants' grantors were the heirs at law, or all the heirs at law, of Elizabeth Meeker, deceased, except an *ex parte* affidavit filed for record in the office of the county auditor, entitled, "Jerry Meeker to the Public." Under this state of facts the appellants may have had a good title in fact, but they did not have such a title as they agreed to convey; namely, a good title shown by abstract, and the respondent was not bound to accept it. *George v. Conhaim*, 38 Minn. 338; *Horn v. Butler*, 39 Minn. 515; *Howe v. Coates*, 97 Minn. 385, 107 N. W. 397, 114 Am. St. 723, 4 L. R. A. (N. S.) 1170; *Brown v. Widen* (Iowa), 103 N. W. 158; *Smith v. Taylor*, 82 Cal. 533, 23 Pac. 217; *Boas v. Farrington*, 85 Cal. 535, 24 Pac. 787.

As the respondent was under no obligation to accept the title tendered, he is entitled to recover the \$100 paid on the purchase price, with legal interest, unless he waived strict performance of the contract, and upon that issue the jury found in his favor. Aside from a return of the purchase money paid with interest, we do not think the respondent is entitled to recover for the loss of his bargain for two reasons. In the first place, the contract itself provides that if the title is not good and cannot be made good, within ten days from notice of defects, the agreement to convey shall be null and void, and the purchase money refunded. Under the admitted facts in this case the record title was not good and could not be made good, and therefore, by the express terms of the contract between the parties, the agreement to convey became null and void and no action would lie for its breach.

Again, this court held, after full consideration, in *Morgan v. Bell*, 3 Wash. 554, 28 Pac. 925, 16 L. R. A. 614, that in actions of this kind, where the vendor acts in good faith and the failure of title arises from no intentional fault or wrong

on his part, the measure of damages is the purchase money paid with interest, or nominal damages where no payments have been made. That case was followed and approved in *West Coast Mfg. & Inv. Co. v. West Coast Imp. Co.*, 31 Wash. 610, 72 Pac. 455, and *Babcock, Cornish & Co. v. Urquhart*, 53 Wash. 168, 101 Pac. 718, and has become the settled law of this jurisdiction. We deem it unnecessary to refer to the numerous errors assigned in the appellants' brief, further than to say that incompetent testimony was admitted and erroneous instructions given, but we do not think that these errors were prejudicial in so far as the right of the respondent to recover the purchase money paid is concerned.

The judgment will therefore be reversed, with directions to grant a new trial unless the respondent will remit from the judgment all sums in excess of \$100, and interest, together with costs in the court below, within thirty days after filing the remittitur there. The appellants will recover their costs in this court.

FULLERTON, CHADWICK, GOSE, and MORRIS, JJ., concur.

[No. 7627. Department Two. January 8, 1910.]

SEATTLE HARDWARE COMPANY, *Plaintiff*, v. J. C. WAUGH
et al., *Respondents*, and M. P. HURD, *as Administrator*
etc., *Appellant*.¹

RECEIVERS—FINAL ACCOUNTING—ORDER OF SALE—CONSTRUCTION.
An order for a receiver's final sale of assets embracing "all book accounts, bills, claims, lumber, logs, and all other personal property owned or claimed by said receiver," does not include cash on hand or items of money or property that the receiver took without authority for his private use or wrongfully advanced to a company in which he was interested, not carried on the books or reported to the court, and the existence of which was not known to the court or creditors at the time of the sale; and the receiver is therefore properly required to account for the same as cash on hand.

¹Reported in 106 Pac. 471.

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Opinion Per MOUNT, J.

Appeal from a judgment of the superior court for Skagit county, Joiner, J., entered February 18, 1908, upon findings against a receiver, upon a hearing on his final report, requiring the payment by the receiver of moneys for which he had not accounted. Affirmed.

Jay C. Allen and *M. P. Hurd*, for appellant.

J. C. Waugh and *Roberts & Hulbert*, for respondents.

MOUNT, J.—After the appeal was taken in this case, the appellant died. His death was suggested at the oral argument, and it was then stipulated that the administrator should be substituted as appellant. M. P. Hurd has since been appointed administrator of the estate of the appellant, and said substitution is accordingly made.

It appears that, in the year 1903, an action was brought by the Seattle Hardware Company against J. C. Waugh and others, doing business under the name of the North Avon Lumber Company. In that action J. E. Potts was appointed receiver of the property of the lumber company, and took possession thereof. He was authorized by the court to operate the sawmill and to carry on the business of the company. About that time the receiver and one H. B. Freeman organized a logging company, known as the Freeman Logging Company. The receiver thereupon, by permission of the court, entered into a contract with the Freeman Logging Company, of which he was a member as before stated, by which contract the logging company agreed to cut saw logs from lands belonging to the lumber company in possession of the receiver, and to deliver such logs at the mill of the receiver at a fixed price. The receiver was also authorized by order of the court to make certain repairs to the mill, not to exceed \$5,000. Repairs were subsequently made which cost in excess of \$10,000.

After the mill had been operated by the receiver for about three years, and none of the debts of the lumber company

had been paid, and many reports had been made by the receiver showing the financial condition of the receivership, the receiver made a report to the court that Schwager & Nettleton, a corporation, had offered to purchase "the whole of said plant, including all lands, all machinery, lumber, and book accounts, all timber tracts and leases," and pay therefor \$9,600, and assume all the receiver's liabilities except the salary of the receiver and his attorney's fees. The report also represented that this sum of money would pay the creditors about fifty-five per cent of the face of their claims, and that a large majority of the creditors of the lumber company had agreed to accept fifty per cent of the face of their claims and satisfy the same, and were willing that the property should be sold to Schwager & Nettleton upon the terms proposed. The receiver recommended and petitioned the court to order such sale. Thereupon a notice was given to all the parties interested to appear at a certain time and place and show cause why the order of sale should not be made as recommended. The defendants in the original action objected to the sale. At a hearing on March 26, 1906, the court made an order for the sale of the property as follows:

"It is therefore ordered, adjudged and decreed that J. E. Potts as receiver herein be and he is hereby directed to forthwith make and execute a good and sufficient deed of conveyance of all the real estate hereinbefore described to said Schwager & Nettleton, Incorporated, and that he shall also make and execute a good and sufficient bill of sale of all the personal property owned or possessed by said receiver, including mill machinery, appliances, buildings, all book accounts, bills, claims, lumber, logs, and all other personal property owned or claimed by said receiver, and that he shall also execute to said Schwager & Nettleton, Incorporated, a good and sufficient assignment of all leases, agreements now held or owned by him as such receiver, and that upon delivery of such conveyance he accept from Schwager & Nettleton, the said sum of \$9,600, and that he forthwith pay out of the same, the sum of \$1,075 to C. S. Wiley, \$200

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to Messrs. Hurd & Brickey, and fifty cents on the dollar on the face of all claims presented to him as hereinbefore mentioned, and that the balance of said money be retained in his possession until the further order of this court."

Thereupon the transfer was made by the receiver as directed, and \$9,600 was paid to him by Schwager & Nettleton, and the same was disbursed as directed. Thereafter the receiver made his final report, setting forth all his acts and doings, and showing a balance of cash on hand amounting to \$38.89, and prayed for a discharge. The defendants in the original action, and Tatum & Bowen, one of the creditors, filed certain objections to the report, and charged that the receiver had not accounted for all the funds received by him. The hearing was had upon this report, and the objections made thereto, and the court found, among other things, that:

"(7) On March 26, 1906, there was cash in the hands of the said receiver amounting to eighty-seven and 21-100 dollars; and that after making the said sale to the said Schwager & Nettleton and after paying fifty cents on the dollar on all the claims, as directed by the court, out of the said purchase price of ninety-six hundred dollars received from Schwager & Nettleton, Inc., the said receiver had remaining the sum of thirty-eight and 89-100 dollars.

"(8) The court further finds that the said receiver sold ——— Angevine certain telegraph poles cut and removed from the lands owned by the said association, for which the said receiver received the sum of ——— dollars; that it is admitted by the said receiver that there was due the said estate at least the sum of ninety-three and 70-100 dollars received from the said Angevine on account of said poles; that the said receiver never made any entry in his books regarding the sale of these poles, and never at any time accounted to this court for the sum received therefor and was not entered upon any of the books or files of the said receivership nor in any wise reported to the court or to the creditors or the defendants herein.

"(9) That the said receiver, on or about ———, without any order or authority from this court, sold to the

Sumner Iron Works of Everett, a lot of machinery and mill equipment belonging to the said receivership for the sum of three hundred dollars; that the said sale was not authorized by the court and said receiver failed to make any report of said sale and failed to make any account for the proceeds thereof; that the said receiver took in exchange for the said machinery other goods and machinery in payment, not for the benefit of said receivership, but for the Freeman Shingle Company, a corporation, in which the said receiver directed that the said machinery received from the said Sumner Iron Works, as aforesaid, be shipped direct to Hamilton to the said Freeman Shingle Company.

“(10) The court finds that on or about ——— the said receiver sold to the Sumner Iron Works a quantity of lumber amounting to three hundred and fifty-seven and 59-100 dollars for which the said receiver made no report to this court and did not in any manner account therefor, but, on the contrary, took in exchange therefor certain machinery for the Freeman Shingle Company, in which the said receiver was interested as aforesaid; that neither of said transactions with the said Sumner Iron Works appears upon the books of the receivership and were not in any wise reported to this court until upon the hearing of this report.

“(11) That after the application of the said Schwager & Nettleton to purchase the property of said receivership, and before the 26th day of March, the time of the sale, the said receiver advanced to the Freeman Logging Company sixty-six hundred and seventy-nine and 98-100 dollars, or the sum of thirty-two hundred and five and 11-100 dollars more than was due the said Freeman Logging Company for logs delivered during said time; that the said receiver was during all said times interested in said Freeman Logging Company, owning one-half interest therein; that the said moneys were so advanced to the said Freeman Logging Company without any authority and without the knowledge of this court or the creditors or the defendants herein.

“(12) That on February 1, 1906, without any authority and without the knowledge of this court or any of the creditors or the defendants herein, the receiver paid to himself out of the moneys in his hands as receiver the sum of six hundred dollars, which he claims was due him as salary from the time of his appointment to January 5th, 1906; the court finds as a fact that the receiver's salary for said period had

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been settled by an order of the court, and that the court did not at the time of making said order, and does not now feel, that the said receiver was entitled to more than the compensation then allowed by the court in the order aforementioned."

Based upon these findings, the court entered an order requiring the receiver "to immediately pay into the registry of the court the sum of \$4,682.50, to be disposed of by the further order of this court." The receiver has appealed from that order.

It is contended here that, under the order of sale, the proceeds of all these items, except the \$38.90 and the \$600 item which the receiver appropriated as salary, were "claims, bills, or accounts due the receiver," and passed by the sale above mentioned to Schwager & Nettleton, and that the receiver paid the same to Schwager & Nettleton, and thereafter was discharged, and that it was error for the court to require the receiver to pay the amount thereof into court to be disposed of as assets of the receivership. The items, tersely stated, were as follows: \$38.90 balance of the \$9,600 in the receiver's hands after paying fifty per cent of the claims of the creditors and the attorney's fees; \$87.21 cash on hand as reported prior to the sale of the property; \$93.70 for poles sold to Angevine and collected by the receiver; \$300 for machinery which was sold by the receiver and used to pay individual debts of his own; \$357.59 for lumber used in the same way; \$3,205.11 cash advanced by the receiver to the Freeman Logging Company of which he was a member; and \$600 cash appropriated to himself as salary to which he was not entitled.

It is conceded that the first and last items mentioned above should be paid into court as directed. But appellant contests the other items upon the grounds stated above. None of these items appear to have been carried upon the books of the receivership, or to have been reported to, or filed with, the court as assets in the hands of the receiver prior to the order

of sale, except the item of \$87.21. The existence of these items was not made known to the court or creditors or to counsel in the case, prior to the time of sale. These items, therefore, could not have been, and evidently were not, considered when the order of sale was made, and were not in contemplation of the parties at the time the bid was made by Schwager & Nettleton, or at the time the order of sale was made. The trial court, upon the hearing of the final report of the receiver, was of the opinion that these items, having been received in money or its value and retained by the receiver for his private use, must be treated as cash in his hands, and that such items did not pass to Schwager & Nettleton as "book accounts, bills, claims, lumber, logs and all other personal property."

We think the trial court must be sustained in this ruling. It was clearly not the intention of the parties to sell or convey money in the hands of the receiver, and we think the wording of the order above quoted cannot be so construed as to include the conveyance of money. Appellant does not now insist that the first and last items, concededly being money in the receiver's hands, passed to the purchaser, for it is conceded that these items must be paid into court by the receiver. The other items, while not actually cash in the hands of the receiver, should be treated as such, because the evidence shows that the item of \$93.70 for poles was actually paid to the receiver through his daughter, who was acting as the receiver's agent to collect the same. The two items amounting to \$657.59 were used by the receiver out of the estate to purchase property for his own use. Instead of taking cash, he took machinery and lumber, and of course became personally responsible for the amount thereof in cash. As to the other item of \$3,205, this was actual cash of the receivership, advanced in excess of what was due to the company, in which the receiver was personally interested. He was not authorized by any order of the court to do any of the things above mentioned. In short, all these transactions amounted to taking

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cash out of the receivership estate and converting it to the private use of the receiver. He was bound to account for these funds as cash in hand, and not as book accounts, claims, bills, or property due the receiver. It will not do to say that a receiver may, without an order of court, take cash out of the estate, convert such cash to his private use, or—which is the same thing—exchange property of the estate for other property for his personal use, and then be heard to say that the estate merely holds a claim or account against him. When he receives cash or its equivalent from the estate, he must account for it as such. We therefore think the trial court was right in treating the amount of these items as cash in the hands of the receiver. The fact that the receiver misconstrued the order of the court and paid the amount of these items to Schwager & Nettleton, if he did so, does not relieve him from liability to account to the court for the funds of the estate. If there was any doubt in his mind as to the proper disposition to be made of the money in his hands, his safe course was plain.

The judgment appealed from is therefore affirmed.

RUDKIN, C. J., DUNBAR, PARKER, and CROW, JJ., concur.

[No. 8181. Department Two. January 8, 1910.]

CLARENCE E. MAYNARD, *Appellant*, v. FIRST BANK OF
COLTON, *Respondent*.¹

COMPROMISE AND SETTLEMENT—MISTAKE—EVIDENCE—SUFFICIENCY.
A finding that there was no mistake or fraud in a compromise and settlement is justified by the evidence, where after action brought upon an account extending over a period of years, the parties got together, the accounts were gone over, item by item, and \$3,550 was finally paid in full satisfaction of claims amounting to \$4,743.85; and it appears that the claim of mistake related to a note of \$700 and interest which had been twice charged in the account, which double charge was admitted, but there was evidence that a credit was given for the double charge prior to the settlement, and the note was one of the disputed items in the settlement.

Appeal from a judgment of the superior court for Whitman county, Chadwick, J., entered March 31, 1908, upon findings in favor of the defendant, after a trial on the merits before the court without a jury, in an action on contract. Affirmed.

Thomas Neill, for appellant.

Hanna & Hanna, for respondent.

MOUNT, J.—The appellant brought this action to recover the sum of \$912, alleged to be owing to him from the respondent. The cause was tried to the court without a jury. At the close of all the evidence, the trial court was of the opinion that the amount in controversy had been adjusted by accord and satisfaction prior to the bringing of the action, and for that reason dismissed the case. The plaintiff has appealed from that order.

It appears that, in the year 1905, the respondent brought an action against the appellant, alleging that appellant was indebted to the respondent on three causes of action, in the amount of \$4,743.85, besides interest. The cause never came

¹Reported in 106 Pac. 182.

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to trial because the parties got together, and the accounts, which had extended over a period of years, were submitted item by item, and were finally settled, the appellant paying to the respondent the sum of \$3,550 in full satisfaction of the account. After this settlement was made, the appellant was informed by a former employee of the bank that a note of \$700 and interest had been twice charged to his account, and by the settlement was paid twice. The appellant claimed that he had not been informed and did not know of this fact at the time of the settlement. The fact of the settlement is admitted, and the fact that the note was charged twice to appellant's account is also admitted. But there is evidence that a credit was given for the double charge prior to the settlement. At the time of the settlement, the full statement of all of the items of appellant's account was submitted to him, and among these items appeared this note with interest. Some of the items were disputed and some were not. This note was among the undisputed items. The parties finally agreed upon a compromise of the whole dispute for a sum much less than the respondent's original claim. This settlement is of course conclusive, unless it can be set aside for mistake or fraud. In order to meet the evidence that the double charge had been corrected prior to the settlement, as it appeared on the books of the respondent, the appellant testified that he had made a deposit of cash of the same amount as the note on the same day that the note was credited back to his account, and that, instead of entering the cash deposited, the credit was entered as of the note. The trial court, however, was not convinced that such was the fact, and concluded that the evidence was not sufficient to justify a finding of mistake or fraud, and therefore dismissed the case, and we think the trial court was justified therein.

The judgment must therefore be affirmed, and it is so ordered.

RUDKIN, C. J., CROW, PARKER, and DUNBAR, JJ., concur.

[No. 8212. Department Two. January 8, 1910.]

THE STATE OF WASHINGTON, *on the Relation of E. J. Dyer, Trustee, Respondent, v. MIDDLE KITTITAS IRRIGATION DISTRICT et al., Appellants.*¹

MANDAMUS—TO ENFORCE PAYMENT OF CORPORATE JUDGMENT—NATURE OF REMEDY—ELECTION OF REMEDIES. The recovery of a money judgment against an irrigation district is not an election of remedies or a splitting of causes of action, so as to bar a mandamus proceeding to compel the sale of bonds to pay a disputed claim, on the theory that mandamus could have been maintained in the first instance, where it was not alleged in the original action that the district had no property subject to execution or that the officers would refuse to satisfy the judgment; the presumption being that the officers would perform their duty to pay the judgment, and mandamus in such case being in the nature of a remedy in aid of execution rather than an original cause of action.

LIMITATION OF ACTIONS—JUDGMENTS—ACTIONS TO ENFORCE—TIME OF ACCRUAL—MANDAMUS TO PAY JUDGMENT. An action for a mandamus to compel an irrigation district to sell bonds to pay a judgment does not arise until the judgment is obtained and the refusal of the district to satisfy the same.

WATERS—IRRIGATION DISTRICTS—MANDAMUS TO PAY JUDGMENT—NECESSARY PARTIES—STATUTES. Under Laws 1895, p. 448, § 22 (Bal. Code, § 4201), authorizing the board of directors and secretary to receive and pay out the funds of an irrigation district, the district treasurer, as disbursing officer, is not a necessary party to proceedings in mandamus to compel the district to sell bonds to satisfy a judgment against the district.

COURTS—ENFORCEMENT OF ORDER—APPOINTMENT OF COMMISSIONER—CORPORATIONS—FAILURE OF AGENTS. Under Bal. Code, § 4717, the court has power to appoint a commissioner to act for an irrigation district, where the district was mandamusd to sell bonds and it appeared that the president of the board of directors was insane and the board was without a quorum.

ABATEMENT AND REVIVAL—CORPORATIONS—DEATH OF OFFICER. The death of an officer of a corporation pending suit does not abate the action or affect the duty of the corporation to supply agents necessary to perform its corporate duties.

¹Reported in 106 Pac. 203.

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Appeal from a judgment of the superior court for Kittitas county, Preble, J., entered January 2, 1909, upon findings in favor of the plaintiff, granting a writ of mandamus, after a hearing on the merits. Affirmed.

A. L. Slemmons and *T. L. Stiles*, for appellants.

Carroll B. Graves, *C. S. Voorhees*, and *Reese H. Voorhees*, for relator.

MOUNT, J.—This is an action in mandamus, to compel the Middle Kittitas Irrigation District, by its board of directors and executive officers to issue and sell its bonds and to apply the proceeds thereof in satisfaction of a judgment for the sum of \$71,610.47, together with interest and costs, obtained by the relator against the said irrigation district, on December 8, 1905. Upon the trial of the case, the lower court ordered the writ, as prayed for in the application. The irrigation district and its officers have appealed from that judgment.

The main facts in the case are, in substance, as follows: The Middle Kittitas Irrigation District is a corporation, organized under the provisions of the act of March 20, 1890, entitled, "An act providing for the organization and government of irrigation districts and the sale of bonds arising therefrom and declaring an emergency." Laws of 1890, p. 671 (Bal. Code, § 4166 *et seq*). After the organization of the district, the board of directors submitted to the voters of the district the question whether such district should issue bonds in the sum of \$200,000 for the purpose of constructing an irrigating canal therein. At such election, held on October 16, 1891, a majority of the votes were cast in favor of such bond issue. Afterwards the bond issue was declared valid, and approved and confirmed. *Board of Directors Middle Kittitas Irr. Dist. v. Peterson*, 4 Wash. 147, 29 Pac. 995. Thereafter, in July, 1894, bonds were prepared to the amount of \$200,000; \$20,000 of these bonds were issued, but the same were void because they did

not conform to the requirements of the act of March 20, 1890.

Thereafter on July 23, 1894, the appellant corporation entered into a contract with one Peter Costello for the construction of its proposed canal. Mr. Costello proceeded with the work and thereafter assigned his claim for a balance due him under the contract to the relator, E. J. Dyer, as trustee. Mr. Dyer thereafter brought a suit against the corporation to recover the amount of the claim assigned to him. A demurrer was sustained to his complaint, but on appeal this court held the complaint sufficient. *Dyer v. Middle Kittitas Irr. Dist.*, 25 Wash. 80, 64 Pac. 1009. Thereafter the case was tried, and finally resulted in a judgment in favor of the relator for the amount due. *Dyer v. Middle Kittitas Irr. Dist.*, 40 Wash. 238, 82 Pac. 301. This final judgment was rendered by the lower court on December 8, 1905, for the sum of \$71,610.47, with costs taxed at \$621.85. The judgment bears interest at the rate of six per cent per annum from that date. The Middle Kittitas Irrigation District has no money or property with which to pay said judgment and costs, except the bonds above referred to. Demand was made upon the appellants for the preparation and sale of such bonds and the application of the proceeds thereof to the payment of the judgment mentioned. Appellants refused and have neglected to comply with such demand. In June, 1907, this action in mandamus was begun to compel the sale of the bonds as above stated.

It is argued by the appellants that the action is barred by the statute of limitations, and that the judgment in the main action is *res judicata* and conclusive of the rights of the respondent to maintain this action in mandamus. The position that the action is barred by a lapse of time is based upon the theory that mandamus might have been brought in the first instance, and all questions relating to the breach of the contract and the enforcement of payment could have been tried out in that case; and therefore, because this was

not done, the right of mandamus to enforce the payment of the judgment has expired. Appellants rely upon *State ex rel. Barto v. Board of Drainage Com'rs.*, 46 Wash. 474, 90 Pac. 660; *State ex rel. Brown v. McQuade*, 36 Wash. 579, 79 Pac. 207; *State ex rel. Race v. Cranney*, 30 Wash. 594, 71 Pac. 50, and that class of cases where a judgment could not be enforced except by the writ. In short, the writ was necessary as a means of enforcing the judgment where the judgment at law could not be enforced by execution in the ordinary course. In that class of cases, while we held that the writ was properly sued out for the reasons stated, it was not held that such form of action was necessary in all cases, or that it would be proper where it did not appear to be necessary to an adequate remedy. At the time the original action was begun, no allegation was made in the complaint that the district had no property which could be seized by execution, and no allegation that the officers thereof would refuse to satisfy the judgment. The plaintiff was content to bring an ordinary action for debt for breach of contract, and rely, as he had a right to do, upon the presumption that any judgment which he might obtain would be satisfied in the usual way, and that the officers of the defendant corporation would perform their duty under the law. The action was an ordinary action at law without the extraordinary writ of mandamus. While the corporation denied liability under the original contract, it does not necessarily follow that it would refuse to satisfy a judgment obtained by the plaintiff in the action, and of course the remedy to enforce such judgment was not available to plaintiff under the decisions above referred to, until it appeared that the judgment could not be enforced in the ordinary course of law. In other words, mandamus was a secondary right which arose after the judgment was obtained and after the refusal of the corporation and its officers to perform a duty enjoined by law, unless such refusal was alleged or shown in the original action. In the case at bar, mandamus is in aid

of execution, and is therefore in the nature of a remedy rather than an original cause of action. *County Court of Ralls County v. United States*, 105 U. S. 733. While the plaintiff in the original action might have pursued the remedy by mandamus, in conjunction with his action to establish a liability upon the debt, provided he had alleged the necessary facts, and while this court has so held in the cases cited and relied upon by the appellants, this court has not held that the plaintiff must pursue such remedy in the first instance or lose it. In *State ex rel. Brown v. McQuade*, *supra*, we said:

“An action at law against the district will not furnish him relief. The most he could obtain by such an action would be a judgment against the district which would entitle him to a warrant drawn by the directors on the county treasurer. He could not obtain a judgment which could be collected by execution. If the judgment was not paid voluntarily—if the directors still refused to act of their own volition—he would yet have to resort to mandamus to secure his rights.”

This shows that a judgment creditor loses none of his rights to the enforcement of his judgment by failing to ask in the original suit for its enforcement in a specific manner, and the practice has been followed to allow the writ of mandamus as a remedy for the enforcement of a judgment in this class of cases. *Smith v. Ormsby*, 20 Wash. 396, 55 Pac. 570, 72 Am. St. 110; *State ex rel. Ledger Publishing Co. v. Gloyd*, 14 Wash. 5, 44 Pac. 103; *State ex rel. Porter v. Headlee*, 18 Wash. 220, 51 Pac. 369; *Townsend Gas & Elec. Light Co. v. Hill*, 24 Wash. 469, 64 Pac. 778; *Chapin v. Port Angeles*, 31 Wash. 535, 72 Pac. 117; *State ex rel. Cook v. Fairley*, 45 Wash. 52, 87 Pac. 1052.

In *Achey v. Creech*, 21 Wash. 319, 58 Pac. 208, we said: “When a party has a choice of remedies by mandamus or suit for damages the adoption of one bars the right to invoke the other.” But that was a case where mandamus was brought to compel the sheriff to deliver property to the plaintiff. Afterwards another action was brought to recover

damages for the unlawful detention of the same property. In that case it was held that the whole relief could and should have been recovered in either form of action, and there was therefore an election of remedies. The rule there stated was the correct statement when applied to that case. But that case does not decide that mandamus may not be invoked to compel the satisfaction of a judgment, or that a party by bringing an action for debt waives his right to the writ of mandamus or the means necessary to enforce the judgment simply because he does not invoke it in the beginning. In this case the original cause of action was the debt alleged to be owing to the plaintiff by the corporation. The corporation denied the debt. If the plaintiff in that case had been defeated upon a trial, undoubtedly he could not then have brought mandamus to try the same question again, because the right to mandamus to require the corporation to pay depends upon the obligation to pay. But where the plaintiff brings an action at law to determine disputed facts, and obtains a judgment for the amount claimed to be due him, he certainly cannot be said to have split up his causes of action, because he does not at the same time ask for mandamus to enforce any judgment which he might acquire; for it can neither be presumed that the corporation would have no property which could be seized by execution in the ordinary course, nor that the corporation would not satisfy the judgment without the aid of a writ for that purpose.

The presumption is that officers will perform their duties according to law, and persons dealing with them may rely upon that presumption. It has never been held, so far as we are aware, that persons bringing an action for debt or damages against corporations which pay their obligations only in warrants or by taxation, must bring such actions in mandamus or be barred from maintaining mandamus to compel the officers of such corporations to issue warrants or levy taxes to satisfy such judgments. The reason that such is not the rule is found in the presumption that a judgment ob-

tained will be paid in ordinary course, and that the writ of mandamus is only issued as a writ of necessity. It may become a necessary means of enforcing the judgment, but it is not necessarily a part of the original cause of action in debt. In such cases the right to the remedy by mandamus does not arise until the judgment in debt is obtained and entered, and the refusal of the officers of the corporation to act. In this case the right to the remedy in mandamus did not arise until the judgment was obtained and the refusal of the appellant corporation to satisfy the same. For these reasons we think the statute of limitations did not begin to run against the judgment or the remedy to enforce it until December 8, 1905. This action was brought well within the time when the judgment could be enforced. There was no splitting of causes of action and the questions decided in the original action were not *res adjudicata* so as to prevent the writ of mandamus to enforce payment of the judgment.

It is claimed that the writ cannot be enforced because the district treasurer is made the disbursing officer of the corporation and he is not made a party to this action. There is no merit in this contention, because the board of directors and the secretary are authorized to receive the funds of the corporation and may discharge this obligation by a direct application of the funds thereto. Laws 1895, p. 448, § 22 (Bal. Code, § 4201).

At the trial of the case it appeared that J. S. Dysart, president of the board of directors of the district, was insane. It also appeared that the inability of Mr. Dysart left the board of directors of the corporation without a quorum, and there was no board of directors in existence to act for the corporation. A commissioner was thereupon appointed by the trial court to act for the corporation. We think the court had authority, under the provisions of Bal. Code, § 4717, to appoint such commissioner, and to authorize him either to act with or for the board of directors so as to effectively carry out the mandate of the court.

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Syllabus.

At the oral argument on this appeal, it was suggested that Mr. Dysart had died pending the appeal. Mr. Dysart was made a party simply because he was an officer of the corporation. He was a mere agent. The real defendant is the corporation, which still lives and which must act through agents. The disability or death of an agent does not abate the action as to the real defendant. If the corporation itself does not supply the agents necessary to perform its corporate duties, the court under the statute above mentioned has ample authority to do so. The court has acted in the matter, and the death of Mr. Dysart does not affect the judgment.

We find no error in the record, and the judgment must therefore be affirmed.

RUDKIN, C. J., CROW, DUNBAR, and PARKER, JJ., concur.

[No. 8273. Department Two. January 8, 1910.]

GEORGE McDONNELL, *Appellant*, v. COEUR D'ALENE
LUMBER COMPANY, *Respondent*.¹

CONTRACTS—ASSENT—PRELIMINARY NEGOTIATIONS—ORAL PROMISE FOR WRITTEN CONTRACT. An oral contract made in July, for the logging of certain land at an agreed price per thousand, the work to commence about September following, and which fixed the place of delivery and time of payment, is not a completed contract so as to be binding until it was reduced to writing, where it was understood that the same was to be reduced to writing wherein the details should be stated, which writing should be executed upon the return of one of the parties from a brief trip (DUNBAR, J., and RUDKIN, C. J., dissenting).

SAME—ACTIONS—ISSUES AND PROOF—PLEADINGS—AMENDMENTS. Where plaintiffs were orally promised a written contract for the logging of land, and moved their outfit preparatory to the work in reliance thereon before any contract was made, upon failure of the action for breach of the contract to log, in which there was no offer

¹Reported in 106 Pac. 135.

to amend or proof of any damage by reason of the moving of the outfit, the complaint should not be treated as amended on appeal or the judgment of dismissal reversed to allow a recovery for damages.

Appeal from a judgment of the superior court for Spokane county, Huneke, J., entered May 23, 1907, upon the verdict of a jury rendered in favor of the defendant by direction of the court, in an action upon a logging contract. Affirmed.

C. P. Lund, W. T. Stoll, and Edwin McBee, for appellant, cited: *Blight v. Ashley*, Fed. Case No. 1,541; *Nash v. Kreling* (Cal.), 56 Pac. 262; *Wharton v. Stoutenburgh*, 35 N. J. Eq. 266; *Sanders v. Pottlizer Bros. Fruit Co.*, 144 N. Y. 209, 39 N. E. 75, 43 Am. St. 757, 29 L. R. A. 431; *Pratt v. Hudson River R. Co.*, 21 N. Y. 305; *Blaney & Morgan v. Hoke*, 14 Ohio St. 292; *Paige v. Fullerton Woolen Co.*, 27 Vt. 485; *Lawrence v. Milwaukee, L. S. & W. R. Co.*, 84 Wis. 427, 54 N. W. 797; *Bell v. Offut*, 10 Bush (Ky.) 632; *Montague v. Weil & Bro.*, 30 La. Ann. 50; *Cheney v. Eastern Trans. Line*, 59 Md. 557.

Wakefield & Witherspoon and *E. P. Twohy*, for respondent, cited: 1 Page, Contracts, p. 41; *Sibley v. Felton*, 156 Mass. 273, 31 N. E. 10; *Mattoon Mfg. Co. v. Oshkosh Mut. Fire Ins. Co.*, 69 Wis. 564, 35 N. W. 12; *Schenectady Stove Co. v. Holbrook*, 101 N. Y. 45, 4 N. E. 4; *Bissinger v. Prince*, 117 Ala. 480, 23 South. 67.

MOUNT, J.—The appellant brought this action to recover damages against the respondent for the breach of an alleged contract. At the close of the plaintiff's evidence, the trial court sustained a motion for a directed verdict, and dismissed the action. The plaintiff appeals.

The facts as shown by the evidence are, in substance, as follows: In the year 1905 the respondent was engaged in the lumber business, at Coeur d'Alene, Idaho. The appellant and one Anthony Shea were copartners in the logging

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business. In July of 1905, the appellant and Anthony Shea went from Spokane to Coeur d'Alene to look for a logging contract. They called upon the respondent company, and were informed that that company desired some logging done in that season on Santa creek, which was a branch of the St. Mary's river, in Idaho, where respondent company owned some timber land. Appellant and Mr. Shea thereupon went into the woods and examined the timber, and returned to the office of the respondent company at Coeur d'Alene, where they met and talked with Mr. Newton and Mr. Carroll, officers of the respondent company. The appellant relates this conversation as follows:

"Mr. Carroll asked us if we found anything that suited us, and we told him that we did, but we didn't care to have anything to do with 13 as it was too large. . . . We told him that we did not even care to log all of 23 as our outfit wasn't large enough for that amount of timber. They said they didn't know whether they would care to let a portion of a section or not at that time. We talked it over a couple of days or so and they discussed it with us. We were there a couple of days and had conversations about every day with Mr. Carroll in regard to the conditions. And so we talked over the conditions and several things and finally he said he had decided pretty near what he would do. So that evening he said he was going to Missoula, and we met him and Mr. Newton on the street. He was going to take the electric car down this way and go to Missoula. And he said to us again—he asked us what we wanted to do. We said we were ready to get out the south side of Santa creek any time he desired to let it out. He asked us what we would put the south side in for, delivered in the St. Mary's river, drive it and log it, and Mr. Shea spoke up and said four dollars per thousand. So he turned to Mr. Newton and said, 'I guess that's all right. I guess it will all right to let that to the boys.' I said, 'We want to be certain about it. We want to know whether we are going to get it or not.' He said, 'I will tell you what we are going to do. Mr. Newton and I will talk it over between now and the time the train goes, and we will decide then just what we will do. You boys call around at the

office in the morning and Mr. Newton will let you know just what we will do about the matter.' Mr. Newton was alone in the office and he held us for a moment. I believe he said he was waiting for Mr. Smith. Just then Mr. Smith came in and he called him into the private office and said, 'Mr. Carroll and I talked this matter over this evening and decided to let these boys have the south side of 23.' He asked Mr. Smith what he thought about it and he mentioned the price of four dollars delivered in the St. Mary's river. Mr. Smith said he considered that a fair bargain; that they were getting it done reasonably enough, and at the same time we should be able to make some money out of it ourselves. Mr. Newton said, 'Yes, that is what we figured it would be,' and he turned to us and said, 'You can consider the contract yours.' We told him that our outfit was at Leavenworth, Washington, and that there were several pieces of timber we were thinking about logging, and we did not want to let those go and go to the trouble of getting our outfit unless we were positive of the contract. 'Why,' he said, 'the contract is yours. Go ahead and log it. I would give you a written contract but I prefer to have you wait until Mr. Carroll comes back to arrange the details in regard to the payments. I didn't go over that with him, that is, the payments'; and we told him we didn't care enough about them as we were positive the contract was ours. And he said, 'It is yours. Go ahead and get at it.' "

Mr. Smith, above referred to, testified in substance the same as above, and that Mr. Newton said to appellant and to Mr. Shea that, "they would have to wait until Mr. Carroll got back and that they would arrange the details." Mr. Shea testified in regard to the contract in substance the same as above, and also that he understood that when Mr. Carroll came back a written contract would be entered into. This all occurred in July, 1905. No written contract was entered into. The appellant and Mr. Shea never performed the contract nor entered upon the work, but in the early part of September, 1905, they again went to Coeur d'Alene and were then informed that the respondent had let a contract to other parties, and refused to permit the appellant and Mr. Shea to enter upon the work. The appellant and Shea had

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in the meantime brought their teams and outfit from Leavenworth to Spokane for the purpose of entering upon the work. Mr. Shea assigned his interest in the contract to the appellant, who brought this action to recover the sum of \$4,000 damages alleged to be the profits which the appellant would have made on the contract.

It is apparent from the statements hereinbefore made and from the reading of the evidence in the case that no binding, completed contract was ever entered into. The main features of the contract were agreed upon and the appellant and his partner were informed that the contract was theirs; that they could go ahead and log it. This was said in July, and it was understood that the work was not to be commenced until the following September. The appellant's evidence clearly showed that the details of the contract were not arranged, and the contract itself was to be reduced to writing and the details were to be stated therein. This was never done. At most the parties were negotiating upon the terms of the agreement to be entered into between them. They had agreed upon the main questions. viz., the land to be logged, the price per thousand, and the place of delivery and time of payment, and about the time the work was to begin, and also that the contract should be reduced to writing wherein the details should be stated. But while these features had been agreed upon, they had not passed the stage of negotiations, because they had not been reduced to writing as the parties contemplated. The rule in such cases is stated in 9 Cyc. 280, as follows:

"Where parties are merely negotiating as to the terms of an agreement to be entered into between them, there is no meeting of minds while such agreement is incomplete. Thus, where they intend that their verbal negotiations shall be reduced to writing as the evidence of the terms of their agreement, there is nothing binding on them until the writing is executed."

See, also, Clark, Elementary Law, pp. 167-8; Clark, Contracts (Hornbook series), p. 62. Under this rule it is ap-

parent that no binding contract was proven, which could be enforced or which could be made the basis of an action for damages.

It is argued that, inasmuch as the appellant had brought his teams from Leavenworth to Spokane, Washington, preparatory to going to Coeur d'Alene and entering upon the work, the complaint should be treated as amended here so as to permit a recovery for damages caused thereby. There was no offer to amend the complaint in this respect at the trial, and there is no evidence in the record that the appellant suffered damages on account of bringing his "outfit" from Leavenworth to Spokane. All the evidence is that the "outfit" was brought to Spokane about the 1st of September, 1905, preparatory to entering upon the work. This evidence was admitted over the respondent's objection. But it does not necessarily show that the appellant was damaged.

There is no error in the record, and the judgment must therefore be affirmed.

CROW and PARKER, JJ., concur.

DUNBAR, J. (dissenting)—I am unable to reach the conclusion announced in the foregoing opinion. I think there was a complete agreement which both the parties intended to be an agreement, and that it was therefore binding. There can be no question of the correctness of the rule cited in the majority opinion from 9 Cyc. 280, but in my judgment it has no application to the facts of this case. The same authority, in the latter part of the same section, on page 282, continuing, says:

"On the other hand, an agreement to make and execute a certain written agreement, the terms of which are mutually understood and agreed upon, is in all respects as valid and obligatory as the written contract itself would be if executed. If therefore it appears that the minds of the parties have met, that a proposition for a contract has been made by one party and accepted by the other, that the terms of this contract are in all respects definitely understood and agreed

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upon, and that a part of the mutual understanding is that a written contract embodying these terms shall be drawn and executed by the respective parties, this is an obligatory agreement."

The case of *Hodges v. Sublett*, 91 Ala. 588, 8 South. 800, is cited by the author to sustain both announcements, and does consistently sustain them both, for there it was held that, when a contract is not by law required to be in writing, the parties may verbally agree on all the terms, their mutual assent making a complete contract, in which case a subsequent suggestion or agreement that the contract should be reduced to writing does not make the writing essential to the validity and completeness of the contract. Said the court:

"It is an elementary principle, that the mutual assent of the parties to the same thing, and in the same sense, is an essential element of every contract. When the parties orally agree upon the terms of the contract, and there is a final assent thereto, so that no variation can be introduced into the writing except by mutual consent, the mere suggestion or intention to put it in writing at a subsequent time is not, of itself, sufficient to show that they did not mean the parol contract to be complete and binding without being put in writing."

Clark on Contracts (Hornbook series), page 62, cited by the majority opinion, simply announces the well-established rule as follows:

"Where the parties are merely settling the terms of an agreement into which they propose to enter after all its particulars are adjusted, the negotiations do not amount to an agreement. . . . So, also, if the parties come to an agreement as to terms, but with the intention and upon the understanding that their agreement is to be reduced to writing, and that they are not to be bound until this is done, there is no contract until the writing is drawn up and assented to by both as their agreement. It all depends on the intention of the parties. If they come to a final agreement as to terms, it may bind them, though they intend to reduce the terms into writing for the purpose of becoming bound in a more

formal manner, or for the purpose of preserving a memorial of the terms, or for any purposes other than that of making the writing exclusively their agreement. The question is whether they intend legal consequences before the formal written evidence of their agreement is executed. If they do not, there is no contract until this is done; but if they do intend to be bound without regard to the writing, there is a contract. Whether they intend to make no agreement until the writing is drawn up, or whether they intend to make a perfect agreement to be afterwards reduced into writing, is a question of fact."

Accepting this statement of the law as controlling, can it be said that it appears from the testimony that it was intended that the oral contract should not be binding, when it was so plainly evinced by what was said by the appellant, viz., that their solicitude was concerning the binding quality of the contract, so much so that they waived condition of payment, satisfied to do the work and receive the pay when it was done in order that they might have the assurance that they could rely on the contract being theirs; and this was well understood by Mr. Newton, who said, with reference to the contract and in answer to the statement of the appellant that they had the opportunity to take other contracts which they did not want to give up unless they were sure of getting the one in question, and that they did not want to move their outfits from Leavenworth, Washington, to the St. Mary's river in Idaho unless they were certain of the contract: "The contract is yours; go ahead and log it?" Surely this was not an agreement to enter into an agreement, but was itself an agreement, and was so understood by the parties making it. Being such an agreement, it was enforceable, and I therefore am compelled to dissent from the opinion above expressed.

RUDKIN, C. J., concurs with DUNBAR, J.

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Citations of Counsel.

[No. 8315. Department Two. January 8, 1910.]

CASCADE LUMBER COMPANY, *Respondent*, v. AETNA
INDEMNITY COMPANY, *Appellant*.¹

MECHANICS' LIENS—BONDS ON PUBLIC WORK—NOTICE—FORM. A notice by a materialman to a surety on the bond of a contractor on a public building, stating a claim *against the building* for material furnished to the principal contractor, complies, in substance, with Laws 1899, p. 172, § 1, which requires the notice to state claims *against the bond*.

SAME—TIME FOR FILING—STATUTES—CONSTRUCTION. Under Laws 1899, p. 172, § 1, providing that no action shall be commenced by materialmen against the surety on the bond of a contractor on public work "unless within thirty days from and after the completion of the contract and an acceptance of the work" notice be filed, the claimant need not wait until the work is completed and accepted before filing notice of claim, where the contract was abandoned; nor need the notice be filed within thirty days after abandonment by the contractor where it was not completed or accepted; as the statute only fixes the time after which notice cannot be given.

EVIDENCE—DOCUMENTARY EVIDENCE—BOOKS OF ORIGINAL ENTRY. In an action against a contractor's surety by materialmen, books kept by the contractors in the ordinary course of business, from slips furnished the bookkeeper by different persons making delivery of the materials, are competent as books of original entry to show the amount of material furnished for certain buildings, although the business manager testifying as to the entries had no personal knowledge of the transactions.

Appeal from a judgment of the superior court for Yakima county, Preble, J., entered April 26, 1909, upon findings in favor of the plaintiff, in an action upon the bond of a contractor upon public work, after a trial before the court without a jury. Affirmed.

Peters & Powell and *Wende & Taylor*, for appellant, to the point that the time for the filing of the notice was upon the abandonment of the building, cited: *Catlin v. Douglass*, 33 Fed. 569; *Davis v. Bullard*, 32 Kan. 234, 4 Pac. 75; *Shaw v. Stewart*, 43 Kan. 572, 23 Pac. 616; *Chicago Lum-*

¹Reported in 106 Pac. 158.

ber Co. v. Merrimac River Sav. Bank, 52 Kan. 410, 34 Pac. 1045; *Hutchins v. Bautch*, 123 Wis. 394, 101 N. W. 671, 107 Am. St. 1014; *Basham v. Toors*, 51 Ark. 309, 11 S. W. 282; *McCarthy v. Groff*, 48 Minn. 325, 51 N. W. 218; *Naughton & Dolan State Co. v. Nicholson*, 97 Mo. App. 332, 71 S. W. 64; *Lynn v. New York & N. E. R. Co.*, 127 Mass. 101.

Englehart & Rigg, for respondent, contended, among other things, that the notice was in time. *Merchants' & Traders' Nat. Bank v. New York*, 97 N. Y. Ct. of Appeals, 355; *Catlin v. Douglass*, 33 Fed. 569; *Sanborn v. Fireman's Ins. Co.*, 16 Gray 448, 77 Am. Dec. 419; *Davies v. Miller*, 130 U. S. 284, 9 Sup. Ct. 560, 32 L. Ed. 932; *Young v. The Orpheus*, 119 Mass. 179; *Atherton v. Corliss*, 101 Mass. 40; *Levert v. Read*, 54 Ala. 529; *Cary-Lombard Lumber Co. v. Fullenwider*, 150 Ill. 629, 37 N. E. 899; *French v. Powell*, 135 Cal. 636, 68 Pac. 92.

MOUNT, J.—On or about June 8, 1907, James Gibson and W. Wellington Smith, copartners doing business under the name of Gibson & Smith, entered into a written contract with school district No. 7, of Yakima county, Washington, for the construction of a high school building for such school district, for the sum of \$84,990. The building was to be completed on or before the 15th day of December, 1907. On the 8th day of June, 1907, Gibson & Smith, and the Aetna Indemnity Company as surety, entered into a bond with the state of Washington, conditioned that Gibson & Smith would pay all laborers, mechanics, subcontractors, materialmen, and all persons who supplied the contractor or subcontractors with provisions and supplies for constructing the said building, and also all debts, dues, and demands incurred in the performance of the above-named contract. Gibson & Smith entered upon the construction of the building under their contract, and prosecuted the work until the 30th day of October, 1907, when Smith withdrew and Gibson thereafter continued

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the work until the 21st day of January, 1908, when he wholly abandoned the work, and the building was still uncompleted at the time of the bringing of this action by the plaintiff. While the work was in progress, the Cascade Lumber Company, the Yakima Hardware Company, and Garrett Brothers Company furnished material to Gibson & Smith to be used in the building. On November 21, 1907, the Cascade Lumber Company executed and filed with the board of school directors, and served upon Gibson & Smith and the Aetna Indemnity Company, the following notice:

"To the Board of Directors of School District No. 7, Yakima County, Washington; School District No. 7, North Yakima, Yakima County, Washington; Gibson & Smith and James Gibson, and the Aetna Indemnity Company, 68 Williams Street, New York.

"The undersigned, the Cascade Lumber Company, a corporation, hereby notifies you that it has a bill against the high school building in the city of North Yakima, Yakima County, Washington, for material, etc., furnished to the builders thereof, to wit: Messrs. Gibson & Smith and James Gibson, to be used in said high school building, amounting to five thousand two hundred and fifty and 36-100 dollars (\$5,250.36). We would like to have this account straightened up so that we shall not be compelled to take any legal steps to protect the same, which we shall be compelled to take unless this matter is adjusted. A copy of the bill for material etc., furnished, has this day been filed with the board of directors of said school district No. 7, at North Yakima, Yakima county, Washington, where the same can be seen.

"Cascade Lumber Company, By A. H. Huebner."

Thereafter on April 14, 1908, the said lumber company served and filed in the same manner the following notice, omitting the address, which is the same as in the notice above copied:

"Notice is hereby given that the undersigned, the Cascade Lumber Company, a corporation, organized and existing under the laws of the state of Washington, has a claim in the sum of five thousand two hundred fifty dollars and thirty-six cents (\$5, 250.36), against the bond taken from James

Gibson and W. Wellington Smith, copartners as Gibson & Smith, as principals, and the Aetna Indemnity Company, a corporation, existing under and by virtue of the laws of the state of Connecticut, as surety, for materials furnished to and for the use of said James Gibson and W. Wellington Smith, copartners as Gibson & Smith, and James Gibson as successor in interest of said Gibson & Smith, in the construction of that certain school building in said school district No. 7 of Yakima county, Washington, commonly known as the high school, as follows, to wit: Materials consisting of lumber, windows, doors, sash, mill work, and other building material of a like kind. Dated at North Yakima, Washington, this 14th day of April, 1908.

"Cascade Lumber Company, By A. H. Huebner, Manager."

Under date of January 7, 1908, the Yakima Hardware Company filed in the same manner a similar notice to the last named, except in the amount claimed, which was \$646.02. On the 3d day of February, 1908, Garrett Brothers Company filed a claim substantially similar to the first claim above copied, and on April 14, 1908, Garrett Brothers filed another claim, substantially as the one last copied above, except in the amount, which was \$324. The claims of the Yakima Hardware Company and Garrett Brothers were assigned to the Cascade Lumber Company, and the latter company, as plaintiff, brought suit in the superior court of Yakima county against Gibson & Smith and James Gibson upon the contract, and against the Aetna Indemnity Company upon its bond to recover these several amounts, with interest, setting up in the complaint that they had filed their notices of claim on the bond with the board of school directors as hereinbefore set forth. Gibson & Smith did not appear in the case.

Defendant Aetna Indemnity Company appeared and filed a general demurrer, which was overruled. That company then filed an answer, admitting the execution of the bond and of the contract; denied, upon information and belief, all knowledge with respect to furnishing of materials by the claimants or any knowledge as to the merits of their claims.

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As an affirmative defense, it alleged that, on or before the 21st day of November, 1907, while these claimants had due notice of the default and abandonment of the contract by the contractors, they made no claim on the bond within thirty days after the abandonment of the contract. To this affirmative defense the plaintiff demurred, and the demurrer was sustained. The cause was then tried upon the merits, and the court found for the plaintiff, on the first cause of action, in the sum of \$4,706.60; upon the second cause of action, in the sum of \$214.88; upon the third cause of action, in the sum of \$144; in the aggregate of which sums judgment was rendered in favor of plaintiff and against all of the defendants. From this judgment, the defendant Aetna Indemnity Company has appealed.

The appellant contends that the notices first filed were insufficient in form, for the reason that there is no declaration therein of intention to claim upon the bond, and that these notices were prematurely filed because they were filed before the work was abandoned and before the work was completed and accepted by the board. Section 5925, Bal. Code, provides for the giving of a bond by a contractor for public work for the benefit of the materialmen and laborers. The amendment of 1899, Laws of that year, page 172, provides:

“That such persons shall not have any right of action on such bond for any sum whatever, unless within thirty (30) days from and after the completion of the contract with and acceptance of the work by the board . . . the . . . person claiming to have supplied materials, . . shall present to and file with such board . . . a notice in writing in substance as follows: . . Notice is hereby given that the undersigned . . has a claim in the sum of ——— dollars . . against the bond taken from . . . for the work of”

In *Huggins v. Sutherland*, 39 Wash. 552, 82 Pac. 112, in construing this section, we said:

“The statute clearly makes the right to maintain the action upon the bond depend upon the notice provided for

therein. This provision was for the benefit of the sureties on the bond. Their liability thereon ceased as to the class of persons designated, if no such notice or claim was filed within the time."

It is true that the notices filed and served upon the Aetna Indemnity Company November 21, 1907, do not say specifically that the materialmen have a claim against the bond. But they do say that the claimant has a bill against the high school building for materials furnished to the builders to be used in the building, and the amount thereof. The notices were addressed to the surety company, and served upon it. These notices were the *substance* of the notice provided for by the statute. When it was addressed to and served upon the surety, that company must have known that the notice was given to them solely by reason of the bond, and that the claimants meant thereby to claim against the bond. The surety company could not have been misled thereby. These notices were therefore sufficient under the statute.

It is next argued that the first notices were premature because they were given before the work was abandoned and before the work was completed and accepted. The work had not been completed or accepted at the time the notices were given, or at the time this action was begun. The record does not show that the building is yet completed. The statute says that the claimant shall not have a right of action on such bond "unless within thirty days from and after the completion of the contract and an acceptance of the work," the claimant shall file his notice. Conceding that the abandonment of the work amounted to a completion and acceptance thereof so far as materialmen were concerned, we are of the opinion that the statute only fixes the time after which the notices may not be filed. The words "*from and after*," as here used, indicate when the time begins to run and when it ends, for the purposes of computation only; that is, the time began to run and included the day the work was completed. Vol. 4, Words & Phrases, pp. 2986-7. These

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words do not indicate that the notice must be filed after the completion of the work and before the expiration of thirty days, as contended by appellant. The object of the statute is notice to the surety that the claimant intends to hold the surety. Notice given before the completion of the work would be as effective for that purpose as notice given after the completion thereof. The statute was not intended as a trap and, unless the words used clearly show an intention that the notice shall be filed at a certain time, it should be construed so as to effect its object with fairness. In this case we are of the opinion that the statute does not prevent the filing of the notice prior to the time of the completion or abandonment of the work, and that the first notice was therefore not premature. Appellant seeks to avoid the second notices filed upon the ground that they were not filed within thirty days after the abandonment of the work by the contractors. In view of our holding upon the first notice it is unnecessary to consider this point. The second notices were merely given to cure the defect in the first notices, that no claim was made against the bond.

Certain books of the contractors were admitted in evidence at the trial. Appellant claims that these books were incompetent to show the amount of material furnished, by reason of the fact that the general manager who testified concerning the entries therein had no personal knowledge of the transaction. The books were kept in the ordinary course of business by the contractors. These books were competent to show the fact that the materials were ordered and received. 17 Cyc. 366; Greenleaf, Evidence (16th ed.), § 187; Wigmore, Evidence, § 1077. The fact that slips or memoranda were made out by persons delivering and receiving the material, and that such slips were used by the bookkeeper in making the original entries in the books, did not, in our opinion, take away the character of the books as books of original entry. The evidence is also sufficient, we think, to support the findings that the material was furnished and used in the

building to the amount of the judgment. The other points discussed in the briefs are of no merit or importance, and need not be noticed further.

There is no error in the record, and the judgment is therefore affirmed.

RUDKIN, C. J., CROW, DUNBAR, and PARKER, JJ., concur.

[No. 8359. Department Two. January 8, 1910.]

THE STATE OF WASHINGTON, *Respondent*, v. FRANK BARKER,
Appellant.¹

CRIMINAL LAW—EVIDENCE—CONFESSIONS—TRIAL. Upon an objection to admissions by the accused on the ground of duress, the question whether the admissions were voluntary or were made under the influence of fear produced by threats, within Bal. Code, § 6942, is a mixed question of law and fact and may properly be determined by the judge upon an examination of the witnesses in the presence of the jury.

SAME—APPEAL—REVIEW. Such decision is reviewable on appeal as any other question of law or fact passed upon by the court.

CRIMINAL LAW—EVIDENCE—PROOF OF MOTIVE. In a prosecution for murder, when the accused is shown beyond a reasonable doubt to have committed the crime, proof of motive is not essential to sustain a conviction.

CRIMINAL LAW—EVIDENCE—CONFESSIONS—EFFECT. The jury is properly instructed that voluntary confessions are to be considered as any other testimony, and may be rejected or believed, either in whole or in part.

SAME—CONFESSIONS—INSTRUCTIONS—ISSUE AND PROOF. Where there was no question but what confessions were voluntary, it is not error to refuse to submit to the jury the question whether they were voluntary.

CRIMINAL LAW—TRIAL—CONDUCT—WITNESSES—EXPERTS — EXAMINATION. In a prosecution for murder, it is not error for the court, on the last day of the trial, to refuse to appoint a chemist to examine the clothes worn by the accused for blood stains, the state not having claimed that they were blood stained, and the accused not having subpoenaed any witness for that purpose.

¹Reported in 106 Pac. 133.

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Appeal from a judgment of the superior court for Spokane county, Hinkle, J., entered December 31, 1909, upon a trial and conviction of murder in the first degree. Affirmed.

A. H. Gregg and *P. R. Heily*, for appellant.

Fred C. Pugh and *Donald F. Kizer* (*A. J. Laughon*, of counsel), for respondent.

MOUNT, J.—Appellant was tried and convicted of murder in the first degree. He appeals from the judgment pronounced thereon.

It appears that after the appellant was arrested he was taken to the city jail in Spokane, and while there was taken into the presence of the prosecuting attorney, a deputy sheriff, and two or three police officers, and questioned first in regard to his presence on the day of the murder. The appellant at first denied that he was at Medical Lake where the murder was committed on that day, but when told by the prosecuting attorney that he had proof of the fact that the accused was at Medical Lake on that day, he then admitted that he was there and that he killed the deceased by striking him on the head with a piece of gas pipe; that he did it because the deceased was following him and had addressed him with vile language.

At the trial, when the prosecution called a witness to prove these admissions, an objection was made upon the ground that the admissions were obtained from the defendant by duress, and were made under the influence of fear produced by threats. The appellant by his counsel requested the court to exclude the jury, and to determine this question before the witnesses were permitted to testify to any admissions made by the appellant. The jury was thereupon sent out, and counsel for the appellant proceeded to examine the witness upon the surroundings and how the appellant came to make the admissions. The witness testified that no threats were made against the accused and no inducements were held out to him, except that he was informed that the prosecuting

attorney desired the truth and that it would be better for the accused to tell the whole truth. Thereafter the court recalled the jury and permitted the witness to state all the confession with all of the surrounding circumstances. When the other witnesses to the confession were called, the court refused to send the jury out, and heard all the evidence relating to the confession, and permitted the same to be considered by the jury. It is argued by the appellant that it was the duty of the court to determine the voluntary or involuntary nature of the confession without the presence of the jury. The statute provides:

"The confession of a defendant made under inducement, with all the circumstances, may be given as evidence against him, except when made under the influence of fear produced by threats"; etc. Bal. Code, § 6942.

Under this statute, when it appears to the court that a confession is made under the influence of fear produced by threats, of course it is the duty of the court to exclude the evidence. It is proper for the court to hear the evidence relating to duress and to decide upon the admissibility of such evidence, but there is nothing in the statute requiring such evidence to be taken without the presence of the jury. If the evidence is clear that no threats were made and that the admissions were voluntary, it cannot be error for the whole evidence to be heard by the jury. In *State v. Mann*, 39 Wash. 144, 81 Pac. 561, we said:

"The question whether a defendant is under the influence of fear produced by threats, when he makes statements imputing guilt of the crime charged against him, is a mixed question of law and fact, and the proper way to ascertain the fact is to have the witness detail the circumstances surrounding their making, and all that was said and done preliminary thereto which led to their making. From this the court is much better able to judge whether the admissions are admissible under the statutory rule than it would be were a question asked in the words of the statute and the opinion of the witness taken thereon."

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But this does not indicate that there must be two examinations of the witness, one in the presence of the jury and the other without the presence of the jury. It indicates that the whole examination shall be made in the presence of the jury. The presiding judge must decide upon the admissibility of the evidence, and must strike it out or direct the jury to consider it, according to his conclusion that it is or is not made under the influence of fear produced by threats. The conclusion of the trial judge is reviewable upon this question as upon any other question of law or fact passed upon by the court. In this case the evidence of the witness examined without the presence of the jury was ample to show that the confession was not made under duress, but was the voluntary confession of the defendant made upon two different occasions. The evidence of the other witnesses to the confession was substantially the same as that of the first one. There was, therefore, no error in receiving the evidence or in determining that it was admissible in the presence of the jury.

Appellant claims that the court erred in instructing the jury to the effect that proof of a motive to commit the crime is not indispensable nor essential to conviction. There is no error in this. When the defendant is shown beyond a reasonable doubt to have committed crime, evidence of motive is not essential. 12 Cyc. 394; Wharton, Homicide (3d ed.), p. 915, §595; Abbott, Trial Brief, Crim. Cases, p. 688; *Wheeler v. State*, 158 Ind. 687, 63 N. E. 975.

Appellant also argues that the court erred in instructing the jury as follows:

"If the jury believes from the evidence that the defendant made the confession as alleged and attempted to be proved in the case, the jury should treat and consider such confession precisely as they would any other testimony. Hence, if you believe the whole confession to be true, you should act upon the whole as true. But you may believe part of the testimony and reject the balance if you see sufficient grounds in the evidence for so doing. You are at liberty to act on it

like other evidence in view of all the circumstances of the case as disclosed by the evidence";

and in not submitting to the jury the direct question whether the alleged confessions were voluntarily made. We think the instruction given was proper. If there had been evidence in the case to show that the confessions were not made voluntarily, then it might have been argued with some degree of reason that the jury should determine that question before considering such confessions as evidence in the case. But the record before us shows no contention upon this point. The evidence is undisputed upon the voluntary character of the confessions, and for that reason they must be taken as having been voluntarily made.

The clothes which the appellant wore on the day of the homicide were offered in evidence as a part of the defense. At the time of the offer, appellant's counsel requested the court to appoint a chemist to examine these clothes for blood stains. The court refused to make such order, and the appellant bases error thereon. There was no error in this. In the first place there was no claim made by the state that these clothes contained blood stains. Again, the clothes were in evidence at the instance of the appellant, and showed for themselves. And again, if the appellant desired chemists or any other persons to testify concerning blood stains or the absence thereof on the clothes, he was entitled to a subpoena for such persons at the proper time. He could not wait until the last of the trial and then require the court to appoint some person to conduct a chemical analysis or examination of the clothes. Such proceeding is not required by the code, and might lead to interminable confusion and delay in the trial of jury cases.

We find no error in the record, and the judgment must therefore be affirmed.

RUDKIN, C. J., DUNBAR, PARKER, and CROW, JJ., concur.

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Opinion Per CROW, J.

[No. 7948. Department Two. January 8, 1910.]

H. D. BOYES, *Appellant*, v. TURK MINING COMPANY *et al.*,
Respondents.¹

CORPORATIONS—INSOLVENCY—ASSETS—PURCHASE BY STOCKHOLDERS—FRAUDULENT CONVEYANCES. Part of the stockholders of an insolvent corporation may, as individuals, subscribe a fund with which to purchase the corporate assets upon the foreclosure of a *bona fide* mortgage thereon, where the stock was nonassessable and other stockholders would not raise funds by a *pro rata* voluntary assessment; and such transaction is not a fraud on creditors where the property was openly and fairly purchased at a public execution sale.

SAME—TRUST FUND—RIGHTS OF CREDITORS. That the assets of an insolvent corporation constitute a trust fund for the benefit of creditors does not affect the validity of a foreclosure sale under a mortgage given by the corporation before insolvency.

MORTGAGES—FORECLOSURE—VACATION OF SALE—ESTOPPEL—SATISFACTION AS EQUITABLE ASSIGNMENT—EQUITY—DOING EQUITY. A judgment creditor of an insolvent corporation, who stood by and permitted a purchaser to acquire its rights and thereafter expend money in improvements, cannot ask the vacation of a foreclosure sale under a prior *bona fide* mortgage, so as to establish a prior lien in his favor, without offering to pay the mortgage; since the mortgage would continue as a valid lien equitably assigned to the purchaser at the foreclosure sale, which sale would not satisfy the mortgage.

Appeal from a judgment of the superior court for Stevens county, Carey, J., entered July 3, 1908, dismissing, on the merits, an action to set aside a mortgage foreclosure sale, as a fraud upon creditors, after a trial before the court without a jury. Affirmed.

H. N. Martin and Jesseph & Grinstead, for appellant.

Kenyon & Setters, for respondents.

CROW, J.—On May 5, 1906, H. D. Boyes obtained a judgment in the superior court of Stevens county against the Turk Mining Company, a corporation, for \$1,280.95, and costs. Afterwards he caused an execution to be issued and

¹Reported in 106 Pac. 475.

levied on real estate, consisting of certain mining claims and the improvements thereon, but made no sale. The mining claims having been sold on April 14, 1906, by the sheriff of Stevens county, to Henry Carstens and C. H. Blake, in certain foreclosure proceedings, Boyes, on November 10, 1906, commenced this equitable action against the Turk Mining Company, Henry Carstens, C. H. Blake, and others, to set aside the foreclosure sale as fraudulent and void, and to establish a lien on the property to secure his judgment. From an order of dismissal he has appealed to this court.

From the evidence it appears that on October 12, 1905, the Turk Mining Company, being indebted to the Lincoln County State Bank in the sum of \$7,859.94, executed and delivered to the bank its note and mortgage deed; that the mining company was unable to pay the note when due; that certain of its stockholders thereupon agreed among themselves to raise a fund by individual subscription, and deposit it with the bank in the names of Henry Carstens and C. H. Blake; that the bank was to foreclose its mortgage; that Carstens and Blake were to purchase the property at the foreclosure sale, using the subscription fund for that purpose; that a new mining company was to be then organized in which stock was to be issued to the subscribers in proportion to their several subscriptions; that Carstens and Blake were to convey the property to the new company, and that this plan had been fully consummated before the commencement of this action, except that the conveyance to the new mining company was made thereafter.

The appellant contends that the agreement by certain stockholders to raise the subscription fund was made for the benefit of the Turk Mining Company, and that the foreclosure and sale were conducted in pursuance of a fraudulent and collusive design to illegally divert the assets of the company and prevent the appellant from collecting his claim. The trial court found that the foreclosure proceedings had been prosecuted in good faith, that no fraud was proven, and that

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the appellant was not entitled to any relief. No good purpose would be subserved by stating in detail all the evidence upon which these findings were made. We conclude that it is sufficient to sustain them and to support the final judgment of dismissal. Appellant's attorney on the trial stated that he did not question the validity of the mortgage, but contended that it was foreclosed for the sole purpose of evading the payment of his claim, and that the mortgage had in fact been paid by the Turk Mining Company before it was foreclosed. He utterly failed to produce sufficient evidence to sustain these contentions. It appeared from the evidence that the stock of the Turk Mining Company was nonassessable; that the stockholders as such either could not or would not raise funds by a voluntary *pro rata* assessment sufficient to pay the bank and release the mortgage; that the fund actually raised did not belong to the mining company, but was subscribed by certain individuals in their personal capacity, although some or possibly all of them happened to be stockholders; that the mortgage was foreclosed and that the property was openly and fairly purchased at a public execution sale by Carstens and Blake as trustees for the subscribers.

Appellant, in substance, insists that the Turk Mining Company was insolvent; that the assets of an insolvent corporation constitute a trust fund for the payment of all of its creditors, and that the scheme in pursuance of which the mortgage was foreclosed was fraudulent in that it unlawfully diverted the assets of an insolvent corporation for the benefit of its stockholders, and prevented the payment of its just debts. The trust fund theory stated by appellant has been repeatedly announced by this court and cannot be questioned. It has, however, no bearing upon the facts of this case. Appellant on the trial admitted that the mortgage had been given for a legal consideration, and made no attack on its validity. It did not appear that the corporation was insolvent when the mortgage was given. In fact, the indica-

tions were to the contrary. Subsequent insolvency would not destroy the validity and priority of the claim and lien of the bank. It was entitled to foreclose, and did so in good faith and regular form. Carstens and Blake purchased at the foreclosure sale with the fund raised by personal subscription, in and to which the Turk Mining Company had no claim. No sufficient reason appears for disturbing their title or that of their vendee. The subscribers were under no personal legal obligation to pay the mortgaged debt on behalf of the mining company, nor did they intend to do so with the fund which they raised. Appellant stood by and with full knowledge permitted the new company to acquire its rights and thereafter expend money and labor in the development of the mining claims. He has made no offer to do equity by refunding the money thus advanced, and taking an assignment of the mortgage. He merely attacks the foreclosure proceedings as fraudulent and collusive, but fails to sustain his allegations of fraud. Were the foreclosure sale to be vacated, the mortgage would continue as a valid and subsisting lien prior to appellant's judgment, equitably assigned to the new mining company as successor in interest to the subscribers who advanced the fund with which Carstens and Blake made the purchase. But appellant seeks to have the sale vacated and his judgment decreed to be the first and only lien, upon the theory that the mortgage has been satisfied. The evidence fails to sustain any such theory, and is also insufficient to show fraud.

The judgment is affirmed.

RUDKIN, C. J., PARKER, MOUNT, and DUNBAR, JJ., concur.

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[No. 8010. Department Two. January 8, 1910.]

JOHN T. GARVER, *Appellant*, v. GREAT NORTHERN RAILWAY
COMPANY *et al.*, *Respondents*.¹

RELEASE AND DISCHARGE—FRAUD IN SECURING—EVIDENCE—SUFFICIENCY. In an action for personal injuries for which plaintiff had signed a written release in consideration of \$500 paid him upon a settlement nine days after the accident, there is no evidence of fraud warranting the setting aside of the settlement or the submission of the case to the jury, where it appears from the plaintiff's own testimony that his mind was clear and he was able to transact business, that no fraud was practiced upon him, that he asked no advice from physicians or friends although he had opportunity to do so, that he had an opportunity to read the papers, headed, "release of damages" but failed to do so, that a first offer of \$175 was raised to \$500 and accepted, and that he retained that sum, and that he dealt at arm's length with the defendant.

Appeal from a judgment of the superior court for Spokane county, Kennan, J., entered January 19, 1909, upon the verdict of a jury rendered in favor of the defendant by direction of the court, in an action for personal injuries. Affirmed.

Plummer & Latimer and *Fred Miller*, for appellant.

F. V. Brown, *A. J. Laughon*, and *J. J. Lavin*, for respondents.

CROW, J.—Action by John T. Garver against Great Northern Railway Company, a corporation, and Charles A. Rosebrook, its yard master, to recover damages for personal injuries. From a directed verdict and judgment in favor of the defendants, the plaintiff has appealed.

The appellant, an employee of a transfer company, was injured while unloading freight from a car of the defendant railway company. The trial judge sustained the respondents' motion for a directed verdict, and the only question before us is whether it erred in so doing. The respondents,

¹Reported in 106 Pac. 192.

although denying their original liability, pleaded a settlement with appellant for the sum of \$500, and that appellant had executed a written instrument releasing respondents from further liability. Replying, appellant alleged that the settlement had been fraudulently obtained; that he did not know it was a settlement; that he understood that he was being compensated for loss of time only; that he reposed especial confidence in the claim agent and physicians of the railway company, who misrepresented the probable extent and duration of his injuries, and that he did not know the nature of the papers executed by him.

On the trial the appellant admitted that he had received \$500; that he had signed the release and other papers showing a settlement; but denied that he knew their contents or intended to do anything further than sign a receipt for money then paid. He testified that at the time of the alleged settlement he was confined to his bed, suffering from his injuries, but did not state that his faculties were impaired, that he was unconscious, or that he was in such physical or mental condition as to render him unfit for the transaction of business. In fact, his evidence shows that his mind was clear and that he fully understood and now remembers all that occurred. He was injured on January 20, 1908. The settlement was made nine days later. Respondents' claim agent first called upon him about January 24, and ascertained the wages he had been earning, which he stated were \$70 per month. The agent first suggested \$175 as the amount to be received by him, but called some days later and stated that he was then authorized to pay \$500, which appellant accepted.

Appellant further testified that he at no time asked the attending physicians to advise him of his true condition or the length of time he would probably be disabled. One physician, Dr. Catterson, was called by appellant's employer but appellant also failed to consult him as to his condition. There is no evidence to show that any confidential relation

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existed between the appellant and the claim agent or any of the attending physicians provided by the railway company, and no motive seems to have existed compelling or inducing him to rely on their representations as to the extent of his injuries or as to respondents' liability. The only statements of the claim agent detailed in appellant's evidence were expressions of opinion and not misrepresentations of fact. Appellant admitted that the physicians expressed no opinions to him. It is manifest that he was not deceived or misled by them. The evidence fails to show that he had any less knowledge of the facts and surrounding circumstances than had the claim agent, the only person with whom he dealt.

Appellant testified that, when the claim agent called the second or third time, he signed the papers and received the \$500; that he was not then aware of the contents of the papers; that he simply signed them where directed; but fails to show any attempt upon the part of the agent to prevent him from reading them or knowing their contents. Early in February, within less than a week after receiving the money, appellant, traveling alone, made a trip to Portland, Oregon, where he remained about ten days. He then returned to Spokane and, a few days later traveled alone to Des Moines, Iowa, where he remained, visiting friends, for several weeks. Thence he went to St. Joe, Missouri, returning to Spokane in the latter part of April. During all this time he consulted no physician, nor did he make any effort to obtain any knowledge of his true condition. He has retained the \$500 paid by the respondent railway company, but in his reply alleged that he tendered it into court. The evidence shows that he failed to do so. The original written release which is in the record is partly printed and partly typewritten. The appellant testified that the typewritten portion had not been inserted when he signed it. Accepting this statement as true, it is apparent from the printed portion that it was a release of his entire claim for damages for personal injuries. The first printed words appearing in large type are, "Great

Northern Railway Line. Release of Damages.” There is no evidence that appellant was unable to read the paper, that he was prevented from doing so or that he had no opportunity to do so. His own evidence indicates that he could have read it had he so desired. This court has been very liberal in permitting settlements of claims for damages for personal injuries to be avoided when improperly or fraudulently obtained. But in view of appellant’s own evidence, from which it appears that he had an opportunity to advise with physicians, that he had friends attending him with whom he might have consulted, that he asked advice from no one, that he had an opportunity to read the papers but failed to do so, that the offer of \$175 first considered was later raised to \$500 and accepted by him, that he received and retained that sum, that no confidential relation existed between him and any party with whom he negotiated, that he appears to have dealt at arm’s length, that there is an utter absence of evidence showing or tending to show fraud, and that fraud, although alleged by him, will not be presumed, we conclude that the evidence offered to sustain his allegation of fraud was not sufficient for submission to the jury; that the settlement was valid, and that it bars him from any further recovery. But one conclusion can be reached from appellant’s own evidence, and that is that, at the time he made the settlement and received the money he was satisfied with the transaction; that his present claim of false representations and deceit is not supported by the evidence, and that the established facts fail to bring his case within any rule of law granting relief on account of fraud.

The judgment is affirmed.

RUDKIN, C. J., MOUNT, PARKER, and DUNBAR, JJ., concur.

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[No. 8051. Department Two. January 8, 1910.]

MICHAEL TOBIN, *Respondent*, v. JOHN MCARTHUR *et al.*,
Appellants.¹

EVIDENCE—CONTRACTS—PAROL EVIDENCE TO VARY WRITING. Where a written subcontract for railroad construction fixed a price of 90 cents per cubic yard for "solid rock excavation," evidence of a contemporaneous oral agreement to the effect that solid rock excavation was to be classified according to the principal contract not then at hand, and solid rock excavation "under three feet" to be paid for at a rate of three cents less than the rate of the principal contract, or \$1.22 per cubic yard, is inadmissible as varying the terms of the writing.

SAME. Parol evidence is inadmissible to show that a written contract is not complete by reason of a collateral oral agreement that part was intentionally omitted from the written contract and was to be incorporated later, where the written contract, by the voluntary act of the parties, included a complete contract on the subject-matter.

Appeal from a judgment of the superior court for Spokane county, Kennan, J., entered June 29, 1908, upon the verdict of a jury rendered in favor of the plaintiff, in an action on contract. Reversed.

Danson & Williams, for appellants.

Graves, Kizer & Graves, for respondent.

CROW, J.—Action by Michael Tobin against John McArthur and J. J. Mangen, to recover for services rendered. From a verdict and judgment in favor of the plaintiff, the defendants have appealed.

On December 20, 1906, one H. C. Henry entered into a written contract with the appellants, John McArthur and J. J. Mangen, for the construction of a number of miles of railroad grade. Thereafter and on January 1, 1907, the appellants, John McArthur, and J. J. Mangen, entered into a written subcontract with the respondent, Michael Tobin,

¹Reported in 106 Pac. 180.

whereby they sublet a portion of the work to Tobin. By the Henry contract it was stipulated that the appellants should receive on rock work the following compensation:

	<i>Per cubic yard.</i>
For scab rock excavation where the excavation from the original surface of the rock to the roadbed is less than three feet	\$1.25
For solid rock excavation.....	.93
For solid rock borrow (embankment measure).....	.60
For loose rock excavation.....	.42
For shell rock excavation.....	.33

By the written subcontract it was specified that the respondent should receive on rock work the following compensation:

	<i>Per cubic yard.</i>
For solid rock excavation.....	\$.90
For loose rock excavation.....	.40

It will be noticed that there was a less detailed classification of rock work in the respondent's contract than in the Henry contract. Respondent's principal contention is that, at the time his written contract with appellants was executed, they did not have the Henry contract with them; that without referring to it they could not remember the exact compensation appellants were to receive from Henry for solid rock work under three feet; that prices in the subcontract were to be fixed in each instance at from two to three cents per cubic yard less than in the Henry contract; that not knowing the price to be received by appellants from Henry for solid rock work under three feet, a collateral oral agreement was entered into between respondent and appellants by which it was agreed that respondent should receive three cents per cubic yard for all solid rock work less than appellants were to receive from Henry; that as appellants were to receive \$1.25 per cubic yard for solid rock work under three feet, the respondent was, under such collateral oral agreement, entitled to receive \$1.22 per cubic yard for like work; that appellants had allowed him ninety cents only, and that they were indebted to him for all such work in the additional sum

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of thirty-two cents per cubic yard. The evidence shows that the term "solid rock under three feet" had reference to solid rock which before removal was located not more than three feet above the grade to be established. The Henry contract used the expression "scab rock excavation," which the parties, especially the respondent, seem to have regarded as referring to solid rock.

On the trial respondent offered evidence to show the alleged collateral oral agreement upon which he predicates his right to recover. To this evidence, which was admitted, the appellants repeatedly and continually objected on the ground that it tended to contradict, add to, and vary the terms of respondent's written contract, which, without classification, fixed the price of all solid rock work at ninety cents per cubic yard. The controlling contention of the appellants is that error was committed in the admission of such evidence. An inspection of the contracts will show that solid rock work and prices therefor were classified in the Henry contract but not in respondent's contract, which latter contract fixed one compensation of ninety cents per cubic yard for all solid rock work. It is evident that the solid rock work was a portion of the subject-matter of respondent's written contract, and manifestly any attempt to now classify it by showing an oral collateral agreement does contradict and vary the terms of the written contract which, upon its face, seems to be complete in every detail. Although it contains no classification of any solid rock work as to depth, it does fix a price of ninety cents per cubic yard for all solid rock work without regard to depth, classification, or location. If respondent is permitted to show by parol evidence that he is now entitled to a higher price than ninety cents per cubic yard for a portion of the solid rock work—that under three feet—appellant might also be permitted to show that respondent should receive less than ninety cents for solid rock work at other depths. In either instance such oral evidence would contradict and vary the terms of the written contract solemnly

entered into between the parties. The general rule is, that in the absence of fraud or mistake, parol evidence is inadmissible to contradict, add to, or vary the terms of a written contract. The evidence of which appellants complain should not have been admitted as it tended to change the written agreement of the parties in a material respect.

In *Gordon v. Parke & Lacy Mach. Co.*, 10 Wash. 18, 38 Pac. 755, this court said:

"Where there have been collateral oral agreements and the parties have not, by their written contract, appeared to intend to reduce their entire negotiation to written form, there are many cases sustaining the admission of parol evidence concerning the unwritten terms of such agreements. 17 Am. & Eng. Ency. Law, p. 448; *Pierce v. Woodward*, 6 Pick. 206; *Chapin v. Dobson*, 78 N. Y. 74, 34 Am. Rep. 512; *Willis v. Hulbert*, 117 Mass. 151; *Graffan v. Pierce*, 148 Mass. 386, 9 N. E. 819. But in all of the foregoing, as well as in many other cases which might be cited, the written contract itself was resorted to as the source of authority for receiving parol evidence; and this is the universal rule. 'The test of the completeness of the writing proposed as a contract is the writing itself. If this bears evidence of careful preparation, of a deliberate regard for the many questions which would naturally arise out of the subject-matter of the contract, if it is reasonable to conclude from it that the parties have therein expressed their final intentions in regard to the matters within the scope of the writing, then it will be deemed a complete and unalterable exposition of such intentions. If, on the other hand, the writing shows its informality on its face, there will be no presumption that it contains all the terms of the contract.' "

See, also, *O'Connor v. Enos*, ante p. 448, 105 Pac. 1039; *Thompson v. Libby*, 34 Minn. 374, 26 N. W. 1; *Union Selling Co. v. Jones*, 128 Fed. 672; *Squier v. Evans*, 127 Mo. 514, 30 S. W. 143.

Respondent contends that the written contract between himself and the appellants was not complete; that material provisions fixing a portion of the prices to be paid were omitted therefrom, with the oral collateral agreement that

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they should be ascertained later; that parol evidence to establish such collateral agreement, which was intentionally omitted from the written contract was properly received, and that it does not tend to vary or contradict the written contract itself. The written contract is complete in its terms and is necessarily presumed to have included the final agreement of the parties resulting from their previous negotiations. If there was a collateral agreement by which solid rock work was to be classified and different prices paid therefor, there is no apparent reason why the classification could not have been stated in the written contract itself, in connection with the further agreement that the compensation for solid rock work under three feet was to be three cents per cubic yard less than the price fixed in the Henry contract. It would have been an easy matter to have thus stated a rule for fixing the price. Respondent in his brief has quoted extensively from §§ 2430 and 2442 of Wigmore on Evidence, and in substance contends that there is not a complete but only a partial integration of the agreement in the written contract; that the question of whether there was a complete or incomplete integration is to be determined by the intent of the parties, which must be first determined by the trial judge and afterwards by the jury, as he insists was properly done in this case. There is no necessity for indulging in any discussion of complete or incomplete integration, or for going beyond the terms of the written contract itself to ascertain the intention of the parties. It shows beyond question that the subject-matter of solid rock work excavation was considered and included within its terms. Mr. Wigmore, at § 2401 of his work on Evidence, in defining the term "integration," employed by him, says:

"The Integration of the act consists in embodying it in a *single utterance* or *memorial*,—commonly, of course, a written one. This process of integration may be required by law, or it may be adopted voluntarily by the actor or actors; and, in the latter case, either wholly or partially."

Here the process of embodying the legal act or contract of the parties into a single memorial was the voluntary act of the parties, and the written contract clearly covers the subject-matter now in dispute. At § 2425, Mr. Wigmore says:

"This process of embodying the terms of a legal act in a single memorial may be termed the Integration of the act, i. e. its formation from scattered parts into an integral documentary unity. The practical consequence of this is that its scattered parts, in their former and inchoate shape, have no longer any legal effect; they are replaced by a single embodiment of the act. In other words: *When a legal act is reduced into a single memorial, all other utterances of the parties on that topic are legally immaterial for the purpose of determining what are the terms of their act.*"

Under the rule contained in the italicized portion of the above quotation, italicized by the author himself, it becomes apparent that the oral evidence offered by the respondent was erroneously admitted.

The judgment is reversed and the cause remanded for a new trial.

RUDKIN, C. J., MOUNT, PARKER, and DUNBAR, JJ., concur.

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Statement of Case.

[No. 8025. Department Two. January 8, 1910.]

**W. E. MOSES LAND SCRIP AND REALTY COMPANY, *Appellant*,
v. STACK-GIBBS LUMBER COMPANY, *Respondent*.¹**

SALES—BREACH—DAMAGES—ACTION BY VENDOR—EVIDENCE—SUFFICIENCY. The evidence is sufficient, as against a motion for nonsuit, to sustain an action for breach of a contract to sell land scrip, where the officers of the defendant corporation introduced the plaintiff's representative to one R. as its agent and representative for the purchase of scrip, that after negotiations, R. made a definite offer for scrip at a stated price, which was tendered to the defendant, and was satisfactory to the defendant's secretary, who asked that the scrip be held pending a telegram for funds, that defendant failed to secure funds and refused to complete the sale, and that the scrip cost plaintiff \$100,000 and plaintiff had been damaged in the sum of \$50,000.

CORPORATIONS—CONTRACTS—REPRESENTATION—AUTHORITY OF OFFICERS AND AGENTS. A corporation is bound by a contract for the purchase of land scrip where it was interested in that business and placed its vice president and secretary in sole charge of its head office with apparent authority to deal in scrip, and they designated an agent as the corporation's agent with authority to represent it in the purchase of scrip, and did not promptly disavow a contract made by the agent.

FRAUDS, STATUTE OF—PLEADING. The defense that a contract is void under the statute of frauds for want of sufficient memorandum must be specially pleaded.

SAME—MEMORANDUM OF SALE—SUFFICIENCY. A signed offer for five thousand acres of "Northern Pacific Scrip," under a specified act of Congress, the price to be "fifteen dollars per acre net to you," is a sufficient memorandum of the sale of goods, wares and merchandise to take the same out of the operation of the statute of frauds, although it fixes no time for tender and payment, as a reasonable time would be presumed to be contemplated.

EVIDENCE—TO VARY WRITING—ADMISSIBILITY. Oral evidence to define and explain the term "Northern Pacific Scrip," issued under a specified act of Congress, does not vary the terms of a written contract for the sale thereof.

Appeal from a judgment of the superior court for Spokane county, Kennan, J., entered February 29, 1908, grant-

¹Reported in 106 Pac. 207.

ing a nonsuit, after a trial before the court without a jury, in an action on contract. Reversed.

Peacock & Ludden, for appellant.

C. S. Voorhees and *Reese H. Voorhees*, for respondent.

CROW, J.—This action was commenced by the W. E. Moses Land Scrip and Realty Company, a corporation, against Stack-Gibbs Lumber Company, a corporation, to recover damages for the breach of a contract to purchase land scrip. At the close of plaintiff's evidence, a nonsuit and judgment of dismissal were entered, and it has appealed.

The only question before us is whether the nonsuit should have been granted. The evidence shows that, on or about September 15, 1906, one D. B. Jones, appellant's agent, called at respondent's office, in the city of Spokane, to sell it land scrip; that he then found in charge C. D. Gibbs and R. B. Stack, vice president and secretary of the respondent company; that a conversation then took place, to which Mr. Jones, in part, testified as follows:

"Q. What did you say to Mr. Gibbs, and what was his response? A. I told Mr. Gibbs that our company was in the business of selling land scrip, and that I had understood from their correspondence—information that we had received from them, that they were interested in purchasing land scrip. He responded that they were. They were interested in that matter and that he was just going down to the office of their representative who looked after their scrip locations, and he would be very glad if I would go with him and meet their representative, Mr. Rahn. I told him that I would go with him, and he took me to the office of Mr. A. A. D. Rahn, in the Hyde Block, to whom he introduced me as representing the W. E. Moses Land, Scrip & Realty Company, of Denver, and introduced Mr. Rahn to me as the gentleman who was handling the location of scrip timber lands for their company. Q. Did he say anything about Mr. Rahn's being also the agent, or representative, for the purchase of scrip for them? A. Yes, sir. . . . Q. What did he say? A. He said that Mr. Rahn was looking after the purchase of scrip for their

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company, and that he wanted me to talk with Mr. Rahn regarding scrip";

that after considerable negotiation, Mr. Rahn executed and delivered to Mr. Jones the following written order:

"Rooms 522-523 Hyde Bldg., Spokane, Wash., Sept. 15, 1906.

"The W. E. Moses Land Scrip and Realty Co., Denver, Colo.

"Gentlemen: I hereby confirm my verbal order placed with your Mr. Ben B. Jones today for five thousand acres of Northern Pacific Scrip for location upon unsurveyed lands in the state of Idaho, scrip to be that of the Act of July 1st, 1898, and the price to be paid to you therefor fifteen dollars per acre net to you. Yours very truly, A. A. D. Rahn.

"P. S. I will accept any portion of five thousand acres of the above named scrip at the same price, and will also accept any amount of the same scrip up to ten thousand acres at the same price. A. A. D. Rahn";

that on September 28, 1906, appellant tendered to respondent, at its office in Spokane, Northern Pacific scrip for ten thousand acres, properly assigned, and demanded the agreed purchase price; that secretary Stack, then in charge, said the company wanted the scrip, but that Mr. Rahn was out of the city looking over timber lands in Idaho upon which to locate the scrip, and could not be reached; that the funds for making payment were subject to Mr. Rahn's order, but that he—Stack—would telegraph east for authority to make a draft for the money; that Stack requested the scrip to be held until about October 2 until he could procure funds; that he arranged with the Exchange National Bank for having his draft cashed on telegraphic orders from the east; that he did telegraph for funds; that he finally received instructions not to make the payment or accept the scrip; that the scrip was costing appellant \$100.000, and that appellant had been damaged in the sum of \$50,000. This evidence was sufficient as against a motion for nonsuit.

Respondent, in support of the final judgment, contends that there was a failure to establish any corporate action on the part of the respondent to show any authority of its

officers, or to show that Rahn was its authorized agent, and that, in any event, vice president Gibbs could not delegate his authority to Rahn. Respondent continuously and vigorously objected to each and every offer of evidence made by appellant to show the negotiations with Jones, or the acts, statements, or admissions of Gibbs, Stack, and Rahn, insisting that their authority to bind respondent had not been proven. On many of these objections the trial court ruled with much strictness against the appellant, but sufficient evidence was admitted to fix respondent's liability, in the absence of any evidence in its behalf. It appeared that Gibbs, as vice president, and Stack, as secretary, were in sole charge of respondent's office or headquarters in the city of Spokane; that appellant had received a letter from secretary Stack, making inquiry about land scrip; that later, when Jones called, respondent's vice president and secretary conferred with him in regard to such scrip; that the vice president informed him that Rahn was respondent's authorized agent for purchasing land scrip; that Rahn dealt with Jones for and on behalf of respondent, and that when promptly advised of the order given by Rahn, the respondent took no exception thereto, but through its secretary voiced its approval. Appellant introduced certified copies of written contracts between respondent and third parties for the purchase of timber in the state of Idaho, which contracts had been executed on respondent's behalf by Stack as its secretary.

It manifestly appears that Gibbs and Stack were held out by respondent as its officers and agents, having charge of its offices and business in Spokane, with apparent authority to deal with appellant, and that through them it also designated Rahn as its agent, with authority to represent it in the matter of purchasing land scrip. This court has repeatedly held that, where a corporation permits certain officers or agents to manage its business affairs, or holds them out as having authority, it is responsible for

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their acts within the apparent scope of such business and authority, unless it affirmatively shows such acts to have been unauthorized. *Carrigan v. Port Crescent Imp. Co.*, 6 Wash. 590, 34 Pac. 148; *Saunders v. United States Marble Co.*, 25 Wash. 475, 65 Pac. 782; *Anderson v. Wallace Lumber & Mfg. Co.*, 30 Wash. 147, 70 Pac. 247; *Chilcott v. Washington State Colonization Co.*, 45 Wash. 148, 88 Pac. 113; *McKinley v. Mineral Hill Consolidated Min. Co.*, 46 Wash. 162, 89 Pac. 495.

Corporations necessarily act through officers and agents, and in these busy times, when the great bulk of the transactions of the commercial world is carried on by them, parties with whom they deal do not always find it convenient, practicable, or possible to ascertain from the corporation records what the exact authority of such agents may be, in advance of each and every business negotiation. The public, therefore, deals with those individuals who, in apparent authority, conduct and have charge of the offices and other places of business maintained by such corporations, and who are thus held out as their authorized agents. Although it is elementary that an officer or agent of a corporation can act only within the scope of his authority for the purpose of binding his principal, yet under the circumstances disclosed by the evidence now before us, ordinary justice demands that want of authority in the alleged officers and agents of the respondent must be affirmatively shown by it to overcome the case made by the appellant. There is nothing in the evidence indicating that respondent's vice president has attempted to delegate any of his authority to Rahn. On the contrary, he simply introduced Rahn to appellant's agent as the party to whom respondent had already delegated power to represent it in purchasing scrip. After being so introduced, Rahn dealt with appellant for and on behalf of respondent, and not in any personal capacity. Although he signed the order in his own name, all of the interested

parties at the time knew that he was acting for his principal, the respondent.

Respondent further contends that the written order is not such a memorandum as sufficiently complies with the statute of frauds to support appellant's action; that a contract for a sale of scrip for more than \$50 is within the statute of frauds (Bal. Code, § 4577), being for a sale of "goods, wares, or merchandise"; that the written contract is insufficient as it is shown by the proof to rest partly in writing and partly in parol; that it is insufficient because its subject-matter, "Northern Pacific Scrip," is not described, defined, or identified in the writing itself, and that it is void because it fixes no time of performance or payment which should be a part of its essential terms. The respondent's answer consisted of denials only. It did not plead any defense based upon the statute of frauds, nor does the record affirmatively show that any such defense was urged upon the trial. The principal contention then made was that the persons who assumed to act for the respondent were not shown to have acted with authority. The general rule of pleading has been thus stated:

"While there is no little conflict of opinion regarding the proper mode of taking advantage of the statute of frauds, it may be laid down as a sound and generally accepted rule, with certain exceptions in some jurisdictions, to be noticed hereafter, that, unless it appears otherwise that the contract declared on is obnoxious to the statute, the party seeking its protection must especially insist on it in its pleadings. The reason for this rule is obvious. A parol agreement is neither illegal nor void under the law. The statute of frauds requiring the contract to be in writing is simply a weapon of defense which the party entitled may or may not use for his protection. If he does not specially by plea or answer set it up and rely upon it as a defense he cannot afterwards avail himself of its benefits. Thus it has been held that the defense could not be raised for the first time at the hearing, nor in an instruction; and it is generally held not to be an available defense in an appellate court, unless first set up in the court below." 9 Ency. Plead. & Prac. 705.

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As there must be a new trial and the respondent may wish to amend its answer, we will suggest that, in our opinion, none of the contentions above mentioned can be sustained upon the record now before us. An examination of the written order shows that it is sufficiently definite to comply with the requirements of the statute. It is true that the time of payment is not fixed by its terms, that appellant's agent Jones testified he was to make the tender and receive payment on or before October 1, 1906, and that respondent objected to such evidence, for the reason that it tended to change, vary, or add to, the terms of the written contract. The memorandum, however, in the absence of any such evidence, would readily be construed as contemplating payment within a reasonable time. There is no contention that the time within which appellant did make the tender and demand payment was unreasonable. Evidence was offered to define and explain the term "Northern Pacific Scrip," and such evidence, although objected to, was admissible. It did not tend to change, vary, add to, or contradict the written agreement, but simply explained the technical meaning of its terms, which is permissible. On the evidence admitted, the motion for a nonsuit should have been denied.

The judgment is therefore reversed, and the cause remanded for a new trial.

RUDKIN, C. J., MOUNT, DUNBAR, and PARKER, JJ., concur.

[No. 8048. Department Two. January 8, 1910.]

C. A. GODDARD, *Respondent*, v. INTERSTATE TELEPHONE
COMPANY, LIMITED, *Appellant*.¹

MASTER AND SERVANT—CONTRIBUTORY NEGLIGENCE—APPARENT DANGERS—DUTY OF LINEMAN TO OBSERVE DEFECTS. An experienced lineman employed in the capacity of a "troubleman" to remedy all kinds of trouble on the line, and in charge of the operating department out on the line, who was injured by a fall from a telephone pole by reason of a bent iron step which caused his foot to slip off, is guilty of contributory negligence which was the proximate cause of his injury, and it is error to refuse a nonsuit, where it appears from his testimony that the right way to ascend a pole is to use the hands and feet on each step in the ascent, the accident occurred in the open on a clear day, the defect was apparent at a glance, and the plaintiff made no inspection and did not observe the defect even in grasping it in his hand or in passing, and he was in a better position to see it than any one else, and where it was established that it was his duty to inspect the construction and repair, and correct or report if anything was wrong.

Appeal from a judgment of the superior court for Spokane county, Huneke, J., entered January 2, 1909, upon the verdict of a jury rendered in favor of the plaintiff, in an action for personal injuries sustained by a lineman in a fall from a telephone pole. Reversed.

Danson & Williams, for appellant.

Robertson, Miller & Rosenhaupt, for respondent.

DUNBAR, J.—Respondent was a lineman and a "trouble" man for appellant company. He fell from a telephone pole, in Sand Point, Idaho, on the morning of December 27, 1907. He claims that the cause of his fall was a bent step on the pole. Poles are provided with heavy iron steps on either side, running to the top, on which men climb and descend. These iron steps have an upright prong at the end, making an effectual guard to prevent the feet slipping off. The step in question is an exhibit in the case here, and shows that it

¹Reported in 106 Pac. 188.

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was slightly bent so that one climbing up the pole with a broad shoe might slip off by reason of the prong at the end not being at a right angle with the pole. There was some claim that the pin or step turned in the pole, but an examination of the step renders that claim unwarrantable, for the reason that, if it was bent to the extent claimed by the respondent, it would have been impossible for it to have turned in the wood, the bend being mostly inside of the wood and creating a shoulder which would come against the wood of the pole and prevent it from turning. There is also considerable testimony as to the manner in which the step was driven into the pole, it being claimed that the proper way was to bore the wood first and then drive the step in, and that an attempt to drive it in without first boring was probably the cause of the bend in the step. But with the view we take of the duty of the respondent in the premises, this is not material.

The accident occurred between nine and ten o'clock in the morning on the 27th day of December, 1907, which the respondent says was a clear day. The respondent, at the time of the accident, was about thirty-one years of age, had been engaged in this line of work for about ten years, and had been in the employ of the appellant for about five months previous to the accident. About three weeks of this time he was employed in the capacity of assistant foreman, and his duties generally consisted of linemen's work, stringing wires, and putting in cables. He also had had charge of the operating department out upon the line. The duty of the trouble man was to repair all kinds of trouble—anything he might find, and to make repairs and put in order anything that should be found wrong on the line. Respondent had worked as trouble man a little over three weeks immediately preceding this accident. These pins or iron steps are placed in the sides of the poles so that the steps on each side are about three feet apart, and alternated on each side so as to make an eighteen-inch stride. The step from which re-

spondent fell was the topmost one on the right hand side of the pole. He had ascended the pole for the purpose of repairing some wires. He claims that he did not notice the step when he went up, and did not know that it was bent or twisted in any way. Upon trial of the cause, he obtained a judgment for \$1,500, from which judgment this appeal is taken.

The doctrine that it is the duty of the master to furnish the servant with a reasonably safe place in which to work, with the correlative doctrine that it is the duty of the servant to exercise reasonable care in the performance of the work to avoid injury to himself, are so well established by the decisions of this and other courts that it is not necessary to elaborate them. The law is settled. The difficulty is in applying it to different groups of facts. The plaintiff cannot recover when his own negligence contributes proximately to his injury. The pertinent question in a given case is, did it so contribute. He assumes all ordinary risks incident to his employment and all dangers which are open and apparent. Again, the pertinent question is, were the dangers open and apparent, and ought they to have been discovered by the exercise of reasonable caution. What constitutes a safe place, what dangers are apparent, and what constitutes the exercise of reasonable caution, depend upon facts so multifarious and frequently susceptible of so many different shades of interpretation and meaning, that it is in many instances exceedingly difficult to justly determine the legal standing of a particular case and to apply to it the proper rule. For this reason it will be of no benefit to analyze the many different cases cited by learned counsel on both sides, for the facts of this case may be easily distinguished from the facts in any of the cases cited.

Conceding, for the purpose of this decision, that the pin or step in question rendered the ascent of the pole dangerous, and conceding, further, that the ascent and step were the cause of respondent's fall, we are yet compelled to decide

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that he was guilty of negligence in not noticing the condition of the step when he ascended the pole, and that such negligence was the proximate cause of his injury. While he would not admit in so many words that he took hold of this particular step with his hand, he testified that the right way to ascend the pole would be to use the hands and feet on each step in the ascent, and it will be presumed that this was the manner of his ascent. In this case everything was out in the open. It was the middle of the forenoon, on a clear day. The pole stood out in bold relief, where a glance at it would show the defect if it was so bad that it would have caused the accident. It was respondent's duty before making so perilous an ascent to exercise his senses in an inspection of the pole that he was about to climb—at least, a superficial inspection. But he not only did not look before starting up, but did not observe it in passing over, even when he was using it when he passed to aid himself in the ascension of the pole by grasping it in his hand, thus having opportunity of inspection both by sight and touch. But even if he did not grasp it with his hand, he climbed up to it and passed it, with it right in front of his eyes. He admitted that he was in a better position to view it than any one else could be. It must occur to any one looking at a telephone pole that a defect of this kind could be seen at a glance from the ground, and if observable by one not accustomed to looking at such poles, how much more apparent it ought to be to one who has had years of experience in climbing the poles and working around them, and whose safety of life and limb depends upon the pole being properly furnished.

This is not the case where there is an absolute duty of inspection delegated by the master to a special agent who, by reason of his skill, is better calculated to notice defects than the servant who is ignorant of conditions and has a right to rely implicitly upon a proper inspection by the master or his agent. The testimony of Charles McNeil, the local manager, was to the effect that there was no special inspector,

and that it was understood by the linemen, the trouble men, and every one connected with the operation of the line, that it was their duty to notice the condition of the construction, and if there was anything wrong, to either correct it or repair it; that it was the special duty of the trouble man to notice and correct or repair trouble of any kind, and that the respondent was the trouble man at the time of the accident and had been for something over two weeks. This testimony is not really controverted by the respondent; for while he would not say that it was his duty to inspect, his testimony as a whole showed that it was, and could not be reasonably interpreted in any other way. It is also well established by the verdict of the jury, in answer to special interrogatories, that the company did not have any one in its employ whose duty it was to inspect the lines, poles, and equipment for the purpose of discovering defects and repairing the same. The respondent, being a man of ripe experience, having been an assistant foreman, and, according to his own testimony, having at the time of the accident charge of the operating department out upon the line, it was his duty to notice the defective step, and his failure to do so being the proximate cause of his injury, he cannot recover.

The judgment is reversed with instructions to the trial court to dismiss the action.

RUDKIN, C. J., CROW, PARKER, and MOUNT, JJ., concur.

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[No. 8156. Department Two. January 8, 1910.]

BEN BRESCHLI, *Respondent*, v. AUGUST KUBILLUS *et al.*,
Appellants.¹

EXECUTION—SUPPLEMENTAL PROCEEDINGS — OBJECTIONS — WAIVER. Objection to the validity of proceedings supplementary to execution for the examination of the wife of a defendant cannot be urged where the case was tried on its merits, the appellant asked that the status of money deposited in bank in the name of the wife examined be determined, and she stated that she was ready to turn over money on the order of the court if it belonged to the defendant.

Appeal from an order of the superior court for Spokane county, Hinkle, J., entered March 15, 1909, after an examination before the court upon proceedings supplemental to execution, ordering the payment of money to the plaintiff. Affirmed.

Samuel R. Stern, for appellants.

A. H. Gregg, for respondent.

DUNBAR, J.—Passing all irrelevant statements and contentions in appellants' brief, this is an appeal from a judgment growing out of proceedings supplemental to an execution. The respondent, some three years before the proceedings under discussion, had obtained a judgment against August Kubillus and Adolph Kubillus, the former being the husband of the defendant Helen Kubillus, interpleaded in this case. An affidavit was made by the attorney for the respondent, setting forth the alleged fact that Helen Kubillus had property belonging to Adolph Kubillus and August Kubillus which she refused to apply to the satisfaction of said judgment, and an order was asked requiring the said Helen Kubillus to appear before the court on the 13th day of March, 1909, and then and there be examined as to such property. In response to this petition and affidavit, an order was made requiring Helen Kubillus to appear and answer as prayed for; and she

¹Reported in 106 Pac. 1135.

did appear, and testimony by Helen Kubillus and others was offered, attorney Gregg appearing for the respondent, and Samuel R. Stern, Esq., for the appellants.

Some criticism is made by the appellants as to the legality of the proceedings leading up to this examination, but we are unable to discover in the record anything illegal in the proceedings. The proceeding was the ordinary one in such cases and plainly, it seems to us, within the law. In addition to this, the case was tried upon its merits, the appellant Adolph Kubillus asking that the status of the money in question be determined, and the attorney Stern stating to the court that, if they had any money belonging to Adolph Kubillus, they were ready under order of the court to turn it over, saying to the witness Mrs. Kubillus, "Is not that so?" to which she responded, "Yes," and the case was then tried upon its merits.

The property which was the subject of examination was \$1,100 deposited in the Old National Bank, in the name of Helen Kubillus, which it was claimed belonged to Helen Kubillus and to her brother-in-law Adolph Kubillus, one of the defendants in the original action against whom judgment was obtained. Upon the hearing of the cause, the court found that there was deposited in the name of Helen Kubillus, wife of August Kubillus, in the Old National Bank, the sum of \$1,100, and it ordered and adjudged that the said Helen Kubillus pay to the clerk of the court the sum of \$503.75, out of the money so deposited and belonging to Adolph Kubillus, by check or assignment made to the clerk, and that said money be by the clerk forthwith applied to the satisfaction of said judgment, together with costs. The testimony adduced fully sustains the finding of the court, and the judgment is therefore affirmed.

This disposition of the case renders it unnecessary to discuss or decide the motion interposed by the respondent to strike appellants' brief and dismiss the case because of the

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use therein of improper language in reference to the trial judge and the court reporter.

RUDKIN, C. J., CROW, PARKER, and MOUNT, JJ., concur.

[No. 8254. Department One. January 8, 1910.]

THE STATE OF WASHINGTON, *Respondent*, v. MAY BELLE
COTTRELL, *Appellant*.¹

FORGERY — EVIDENCE — HANDWRITING — PHOTOGRAPHS — ADMISSIBILITY. In a prosecution for forgery it is not error to admit in evidence a photographic copy of a letter supposed to have been written by the accused, introduced for the purpose of comparison by the experts, where the accused, after examining the photograph, admitted that it was a photographic copy of her handwriting.

CRIMINAL LAW—TRIAL—CONDUCT OF COUNSEL—PERSISTING IN IMPROPER CROSS-EXAMINATION. In a prosecution for forgery, in which the accused, who had been living with her mother, testified that she went to Spokane to engage in work to meet pressing obligations, it is prejudicial error, requiring a reversal, for the state, on cross-examination and after objections had been sustained, to persistently question the accused with respect to her financial embarrassments in an effort to show that they arose out of litigation with her mother in which the accused was charged with "swindling" and "defrauding" her mother and was only prevented from so doing by a decision of the highest court of a sister state, the litigation being foreign to the issue and the only purpose being to discredit her before the jury by improper questions.

FORGERY—EVIDENCE—HANDWRITING—IDENTIFICATION. In a prosecution for forgery of a check of one J., another check purporting to be signed by him, admitted for comparison, is sufficiently identified when J. testified that he believed it was genuine.

WITNESSES—EVIDENCE—HANDWRITING — TRIAL. The practice of permitting a witness to illustrate his testimony, in comparing handwriting on a forged check with admitted handwriting, by illustrations on a blackboard cannot be commended, for the illustrations cannot be preserved in the record.

FORGERY — UTTERING CHECK — IDENTIFICATION — EVIDENCE—SUFFICIENCY. There is sufficient evidence of the uttering of a forged check, where the manager and forewoman in a store each testified

¹Reported in 106 Pac. 179.

that the accused purchased goods, uttered the check in payment, and received her change, and the testimony of experts made a question for the jury as to whether the check was forged.

—Appeal from a judgment of the superior court for Spokane county, Hinkle, J., entered February 27, 1909, upon a trial and conviction of forgery. Reversed.

Nuzum & Nuzum, for appellant.

Fred C. Pugh and *Donald F. Kizer* (*A. J. Laughon*, of counsel), for respondent.

GOSE, J.—The appellant was convicted of the crime of forgery, and has appealed from the judgment entered upon the verdict.

The state was permitted to introduce in evidence a photographic letter, purporting to have been written by the appellant, upon the testimony of a witness that the appellant had said to him that it “looked as if it were a copy of her writing.” This letter was used by expert witnesses in connection with the handwriting of the appellant admitted to be genuine, for the purpose of comparison with the indorsement on the forged instrument. It is urged that it was error to admit this instrument in evidence, (1) because it was not shown to be an accurate photograph, and (2) because it was not the best evidence, and there was no showing that the original could not be obtained. Both of these objections would be well taken were it not for the fact that, after the state had rested, the appellant offered herself as a witness and, after examining the photograph, stated that it was a photographic copy of her handwriting. It is well settled that the handwriting admitted or proved to be genuine may be used upon the trial for comparison with the handwriting upon the alleged forged instrument.

The appellant testified on direct examination that she was born in Boise, Idaho, and that she had lived there with slight interruptions until a few months before the trial. She also stated that she had a daughter, a young lady in

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poor health, living at Boise, and that, in order to support and educate her and to meet pressing obligations, it became necessary for her to leave her home, and that she went to Spokane and engaged in canvassing work. The prosecutor, upon cross-examination, was permitted to get before the jury the fact that the appellant's mother had prosecuted a civil action against her in the courts of Idaho, in which she charged the appellant with attempting to defraud her out of her property, and that the case had been recently decided by the supreme court of Idaho in favor of the mother. The cross-examination touching this suit covers five pages of the record, and the prosecutor asked the appellant at least four several times, in varying phraseology, if her financial embarrassments did not arise out of the expensive litigation in which she was engaged with her mother, in which she was charged with "swindling" and "defrauding" her mother out of her property and her home. Whilst objections were sustained to a part of the questions, they were pressed with such insistence that the jury might well have concluded that the appellant had attempted to defraud her mother out of her property, and was only prevented from consummating her design by an adverse decision of the highest court of a sister state. This was certainly highly prejudicial, and gave the case an atmosphere hostile to the appellant. The respondent seeks to justify the cross-examination upon the ground that the appellant had introduced evidence tending to show that she went to Spokane to earn money to meet pressing obligations, and that it was therefore open to it to ascertain the nature of the obligations. It is apparent that the litigation between the appellant and her mother was a matter foreign to the issue, and the only purpose of the inquiry was to discredit the appellant before the jury. Zeal in a prosecuting officer is to be commended, but it will not be permitted to reach such intensity as to transform a prosecution into a persecution. The cross-examination was in violation of the principles an-

nounced in *State v. Bokien*, 14 Wash. 403, 44 Pac. 889; *State v. Oppenheimer*, 41 Wash. 630, 84 Pac. 588; *State v. Montgomery*, ante p. 443, 105 Pac. 1035; *United States v. Wells*, 163 Fed. 313; *Lowman v. State*, 109 Ga. 501, 34 S. E. 1019; *Howard v. Commonwealth*, 110 Ky. 356, 61 S. W. 756.

The information charges that the name of D. P. Jenkins was forged to a check. A check of five thousand dollars purporting to have been signed by him was admitted in evidence as a standard for comparison with his name on the forged check. He testified that he believed this check to be genuine. It is urged that this was error, because he would not state positively that it was his check. We think the check was sufficiently identified.

A witness for the state was permitted to use a blackboard and chalk to illustrate his testimony in comparing the handwriting on the forged check with the admitted handwriting of appellant. This is assigned as error. The course pursued is one that cannot be commended. The illustrations were not, and from their very nature could not be, preserved in the record.

It is finally contended that there is not sufficient evidence to support the verdict, and that the identification of the appellant as the person who uttered the check is insufficient. The manager and the forewoman in the store where the check was uttered each testified that the appellant purchased goods, uttered the check, and received her change. This was a sufficient identification, if believed by the jury. Whilst these witnesses as well as the state's expert witnesses on handwriting were contradicted by credible witnesses introduced by the appellant, it was for the jury to determine from all the facts and circumstances in the case whether the check was forged and, if so, by whom. We cannot therefore rule that the evidence is insufficient.

We are constrained, however, to hold that error was committed by the cross-examination of the appellant in the

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manner heretofore pointed out, and that she has not had that fair and impartial trial which the law guarantees to every accused person. The judgment will be reversed, with directions to grant a new trial.

RUDKIN, C. J., FULLERTON, CHADWICK, and MORRIS, JJ., concur.

[No. 8320. Department One. January 8, 1910.]

N. B. BRUCE, *Appellant*, v. M. L. BEVIS, *Respondent*.¹

BROKERS — COMMISSIONS — CONTRACTS — EVIDENCE—SUFFICIENCY. Where the owner of mortgaged land sold the same and applied to the person to whom he had given the mortgages to substitute a new loan in a larger sum to the vendees, and agreed to pay a commission of \$350 for "negotiating" the loan, the owner is liable for the commissions although the mortgagee made the loan himself, he not having acted as a broker on the sale or in any fiduciary capacity, the application for a loan having been made to him to make the loan himself, and the mortgage being given in his name.

WITNESSES—CROSS-EXAMINATION—CONVERSATION. Where upon direct examination plaintiff gave parts of conversations with the defendant at certain times, it was proper on cross-examination to compel him to give all of the conversations at the times referred to.

Appeal from a judgment of the superior court for Spokane county, Canfield, J., entered January 30, 1909, upon findings in favor of the defendant, in an action on contract, after a trial before the court without a jury. Affirmed.

Harry A. Rhodes, for appellant.

Smith & Mack, for respondent.

MORRIS, J.—Action to recover \$370.06, alleged to be due upon a transaction between the parties hereto, whereby respondent made a loan of \$7,000 upon mortgage security on certain lands formerly owned by appellant and sold by him, under a contract whereby his vendees were to take up two

¹Reported in 106 Pac. 129.

mortgages upon the same lands, previously given by appellant to respondent, amounting at the time to \$4,315.25, and make a new loan of respondent in the sum of \$7,000, the balance representing part of appellant's equity in the land. To the amount due upon the old mortgages, was to be added an advance payment of interest upon the \$7,000 loan, aggregating the sum of \$4,501.92, which sum was to be retained by respondent, plus the expense of abstract and recording fees, and the balance of the \$7,000 turned over to appellant. Appellant received from respondent the sum of \$2,147, which, added to the amount then due upon the old loans and the advance payment of interest on the new, aggregated the sum of \$6,648.92, leaving a balance of \$351.08 which appellant claimed to be due him under his agreement, which, adding interest from the time it was claimed to be due to the commencement of the action, makes the amount \$370.06, for which judgment was demanded. Respondent answered, denying any liability as claimed in the complaint, and set forth that appellant agreed to pay him the sum of \$350 for making the transfers of the two old mortgages and the new loan to appellant's vendees. This being denied, trial was had upon these issues, and at the conclusion of appellant's case, the court dismissed the action, and plaintiff appeals.

It was conceded that the abstract and recording fees exceeded the sum of \$1.08; so that, if the contention of respondent that the \$350 was due him for making the loan is sustained by the evidence, the judgment was correct. Upon reading the evidence, we can come to no other conclusion. Appellant, in connection with this feature of the case, gave the following testimony:

"Q. Did you ever at the time of the first conversation with Mr. Bevis, or any subsequent conversation with reference to this \$7,000 mortgage, agree with Mr. Bevis to allow him a commission for making this \$7,000 loan? A. I agreed to a commission for him to negotiate a loan. Q. Yes, sir; and what was that commission to be? A. \$350. Q. \$350? A. Yes, sir. Q. That is the same \$350, sir, is it not, that you

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are now seeking to recover in this case? A. Yes, sir. Q. That you agreed to allow Mr. Bevis? A. Yes, sir; to negotiate it."

We fail to see how the court, after hearing this testimony of the appellant on his cross-examination, could render any other judgment. Appellant takes the position here that respondent was his broker, and that a broker, acting in a fiduciary relation to his principal, acts in fraud of the principal when he himself furnishes the loan, and charges the commission which the principal understood he was to obtain from outside sources. There are no facts in this case to which such a rule of law could apply. The complaint does not set forth such a situation; neither does the evidence disclose it. The only evidence hinting at such a situation is found in the redirect testimony of appellant, as follows:

"Q. I will ask you, Mr. Bruce, whether or not any statement was made to you by Mr. Bevis as to his taking this loan himself? A. No, sir; he stated to me that he negotiated his loans in the East."

Such evidence was of no value in the light of the other evidence in the case showing appellant applied to respondent to make the loan himself, that respondent had himself made the two previous loans, and he was the payee of the note and mortgage in the \$7,000 loan, which represented the old loans and the new one then made.

Complaint is made of certain questions asked appellant upon his cross-examination, the purpose of which was to sustain respondent's theory. Appellant, having upon his direct examination given such parts of the conversations with respondent as his counsel deemed material to his contention, could unquestionably on cross-examination be required to give all the conversation between himself and respondent, at the times referred to in his direct examination. The objected questions went no further and were competent.

Judgment affirmed.

RUDKIN, C. J., GOSE, CHADWICK, and FULLERTON, JJ., concur.

[No. 8006. Department One. January 8, 1910.]

**BEN STANLEY REVETT, *Appellant*, v. GLOBE NAVIGATION
COMPANY, *Respondent*.¹**

CARRIERS—OF GOODS—CONTRACT—BREACH—RESCISSION—SHIPPING. A carrier's breach of contract, by reason of the disablement of a vessel and the abandonment of her sailing, is not waived or the contract of carriage rescinded by a telegram calling upon the carrier to forward the freight by next sailing and to do all possible to remedy the delay and that the consignor would do the same, especially when a letter referring to the telegram and sent at the same time did not admit the carrier's right to breach the contract and contained only the consignor's assurance that he would do all he could to mitigate the damage.

SAME—TENDER OF CARGO—WHEN EXCUSED. It is not ground for a nonsuit, in an action for breach of contract of the carriage of freight, that the freight was not delivered or tendered on the dock for shipment on the sailing date, when the ship was not ready at that time to receive the cargo and the sailing date was later cancelled because of her disability, especially where there was testimony that the load was ready and waiting when she got in, or in cars ready to be transferred, evidently so prearranged for convenience in unloading heavy materials from the cars without passing through a warehouse.

SAME. A nonsuit, in an action for breach of contract to ship cargoes of freight on or about two specified dates, cannot be sustained by reason of the fact that certain articles were not ready for shipment on the first sailing date, when it appears that they were not intended for that cargo and were to be shipped later, and the damage did not result from the failure to ship such part earlier.

SAME—CONTRACT—BREACH—CONSTRUCTION. A consignor's contract to ship on a carrier's line all of his freight, consisting of two cargoes of lumber and heavy machinery, is not breached by him, as a matter of law, by the shipment of camp equipment and property of a like character, which went forward with the consignor's men on one or more ships of another line; especially where the carrier's first ship was loaded to capacity and refused to take all that had been agreed should go on her.

SAME. Such loss of carriage, if allowable at all, would only be an offset, and could not bar an action for general damages on breach of the contract, the contract not having been rescinded.

¹Reported in 106 Pac. 176.

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Opinion Per CHADWICK, J.

Appeal from a judgment of the superior court for King county, Gilliam, J., entered March 14, 1908, upon granting a nonsuit, in an action on contract, after a trial before the court and a jury. Reversed.

Richard Saxe Jones, for appellant.

H. R. Clise and *C. K. Poe*, for respondent.

CHADWICK, J.—This action was brought to recover damages for an alleged breach of contract of carriage. Defendant was the owner of, and operated, a line of steamers between the ports of Seattle and Nome, Alaska, during the season of 1905. The "Tampico" was advertised to sail on or about June 1, and the "Eureka" was to follow on or about June 15. Plaintiff is a manufacturer of mining dredges, and had contracted with the Seward Peninsular Mining Company, operating near Nome, to set up a mining dredge complete and ready for operation on or before September 1, 1905. A contract of carriage was entered into between the plaintiff and defendant on the 27th day of May, the material parts of which follow:

"Seattle, Wash., U. S. A., May 27, 1905.

"Mr. B. Stanley Revett, Hotel Butler, City.

"Dear Sir: We agree to ship for you and you hereby agree to deliver to us for shipment from Seattle to Cape Nome on steamship Tampico and Eureka, Tampico sailing from Seattle on or about June 1st and the steamship Eureka sailing from Seattle on or about June 15th, all of the freight you have to go to Cape Nome during the season of 1905 and more particularly a shipment of about 225 tons of machinery included in which shipment are two boilers weighing 11 tons each, 2 pieces weighing 6,300 lbs each and 2 pieces 4,700 lbs each, now on the Northern Pacific cars, and 190,000 ft of lumber contained in which are 2 pieces to be made into spuds weighing about 6 tons each, shipment to be made by the Stetson Post Mill Co., of Seattle.

"On the sailing of the Tampico, June 1st, you agree to ship and we agree to carry not less than 75,000 ft. of aforesaid lumber and one car of bolts and any part of the shipment of the machinery which we desire to carry forward on that

vessel. On the sailing of the steamship Eureka on or about the 15th of June you are to ship the balance of the lumber from the Stetson Post Mill Co. and the balance of the machinery not shipped on the Tampico."

Of the total shipment of seventy-five thousand feet of lumber which was to be carried on the Tampico, only sixty-three thousand five hundred feet went forward, the captain refusing to take more. It was intended that the balance of the lumber, as well as the other freight, should go forward on the Eureka. On or about June 25 plaintiff's agent at Seattle was informed by Mr. Thorndyke, the general agent of defendant, that the Eureka was disabled and that her sailing date had been canceled. This fact was communicated to plaintiff at Breckenridge, Colorado, who immediately telegraphed Mr. Thorndyke as follows:

"Eureka sailing abandoned. Request you ship balance lumber first Nome sailing. Machinery on Tampico. Do all you can remedy. I will do all in my power. Writing."

The balance of the lumber was shipped on the Olympian, a vessel belonging to another company, which sailed on or about July 15, and the dredger machinery followed on the second trip of the Tampico, which sailed on or about July 21. It is alleged that the machinery arrived too late to be set up for delivery on or before September 1, and because of defendant's failure to keep its contract, plaintiff has been damaged. From a judgment of nonsuit, plaintiff has appealed.

It appears that the trial judge was moved to grant the nonsuit because of the telegram quoted above. This he construed to be a rescission of the original contract of carriage. Standing alone there might be some difference of opinion as to the legal effect of the telegram, but when considered in the light of the letter written at the same time and of which the telegram carried notice, the telegram cannot be made to bear that construction. The material parts of the letter, after quoting and confirming the telegram, are as follows:

"I am seriously afraid that the delay in getting the balance of the lumber to Nome may seriously retard our work as I

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doubt whether our men will have enough work to keep them employed until the lumber gets there. I have cabled Wilkins and asked them to arrange accordingly. The delay is a most serious one as I am under contract to the company to have the dredge built by Sept. 1st, which at the best under the conditions was an exceedingly limited time, and I would therefore urge you to do everything in your power to expedite the shipment and landing of the lumber first. You may rest assured that we will do everything in our power to remedy the delay."

Taken together these communications do not admit the right of respondent to breach the contract. They recognize a situation for which appellant was not responsible, and contain an assurance that he would do all that he could to mitigate any damages that might follow, and in turn calls upon respondent to do all that it could to remedy the delay.

It is further contended by respondent that, although the court may have erred in its construction of the telegram, nevertheless, if it appears on other grounds that the judgment was right, it should be sustained by this court. Respondent asserts, in behalf of his theory, that the testimony shows that, notwithstanding its breach, appellant was unable to complete and carry out his own contract, in that it was impossible for him to deliver the freight mentioned in the contract on the dock at the time agreed upon, and that therefore respondent is released from any obligation to him. We cannot sustain the judgment by the application of the principles invoked to maintain this contention. Respondent cannot defend because the complete shipment was not tendered at the dock on the day agreed upon—June 15—when it did not have the ship ready, or intend to have it ready, to receive the cargo. It would be a curious rule of law that would sustain a nonsuit when appellant's agent in charge had testified in speaking of the shipment to go forward on the Eureka: "Did you have your load ready for her when she got here [about June 26]? Ans. Yes, sir; had it waiting. Q. Waiting for her? Ans. Yes." Aside from this, appellant was not bound to have the

freight on the dock on the day named in the contract. On May 27 appellant wrote Mr. Thorndyke as follows:

"This will be your authority for arranging with Mr. Nadeau, agent of the Northern Pacific, to deliver to you car No. 34726, containing bolts and spikes, which it is absolutely necessary to go up on the Tampico with 75,000 feet of lumber. There are seven other cars of machinery at Tacoma at the present time, ready for delivery, and it is understood that the Northern Pacific people will transfer these cars from Tacoma to Seattle, free of charge, demurrage or wharfage, as per the arrangement made by Mr. Seegar, the general agent in New York, for delivery to S. S. Lyra, said arrangements being released through the courtesy of Mr. Frank Waterhouse, per the letter which I now enclose you. Kindly keep in touch with Mr. Nadeau in regard to a carload of machinery now in transit from the Taylor Steel & Iron Co., Highbridge, N. J., a carload of machinery from the Standard Boiler Works, Lebanon, N. J., and another carload from Reeves Engine Co., Trenton, N. J. We are promised shipments of these delayed cars by June 1st, and would ask yourself and Mr. Nadeau to arrange for them to be forwarded not later than the Tampico's sailing July 4th."

The two letters voice the agreement of the parties. Courts may well take notice of the fact that freight such as the heavy parts of a dredger may be more conveniently loaded from the car than by passing them through a warehouse, and respondent, so far as the testimony shows, may have made this arrangement for its own convenience.

The further contention, that a ladder and donkey engine, a part of the machinery included in the original contract, had not arrived in Seattle on June 15, is without merit. Reference to the letter just quoted will show that the attention of respondent had been called to the fact that other machinery, about two carloads, was to arrive, and respondent agreed to arrange for its shipment on the second trip of the Tampico. It was so shipped. The damage is alleged to have resulted by reason of the delay in shipping that which should have gone forward on the Eureka on or about

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June 15. The burden was on appellant to show this, and it can make no difference—certainly it will not sustain a judgment of nonsuit—to say that something about the dredger was wanting which may have been, so far as the evidence shows, in no way responsible for the actual damages sustained, and which it had agreed should be shipped later. Respondent cannot hold appellant to the duty of tendering shipment when it was not ready to receive, or when it had agreed to direct the switching of the cars upon which the machinery was loaded ready for delivery. When it canceled the Eureka's sailing date, it was its duty to minimize the damages resulting from its arbitrary breach of the contract, and it cannot now set up a rule adopted for the protection of those who are not in default, to excuse an act which, so far as the evidence shows, is responsible for the condition out of which this action arises.

There is another question developed in the testimony and urged as a defense, and that is that appellant did not in fact ship over respondent's line all of his freight as he was bound to do under his contract, in that certain camp equipment and property of like character went forward with appellant's men on one or more ships sailing in advance of the Tampico. We are unwilling to hold that such freight as this is shown to be is, as a matter of law, freight within the contemplation of the contract. Aside from the fact that the whole record seems to indicate that the freight intended by the parties was the lumber and dredger machinery, the testimony shows, as we have indicated, that the captain of the Tampico refused a part of the freight that was tendered, because his ship was loaded to its capacity. It is fair to presume that the camp equipment would have been likewise refused on the first trip of the Tampico. Upon the present record, the testimony does not show a breach of the contract on that account. The contract not having been rescinded, the amount lost on this account would, if allowable at all, amount to no more than an offset and could

not be pleaded in bar of a right to recover general damages.

The judgment of the lower court is reversed, with directions to try the case on its merits.

RUDKIN, C. J., FULLERTON, GOSE, and MORRIS, JJ., concur.

[No. 8138. Department One. January 8, 1910.]

FRANZ MUELLER *et al.*, *Respondents*, v. WASHINGTON WATER POWER COMPANY, *Appellant*.¹

CARRIERS—INJURIES TO PASSENGERS—PLEADING—COMPLAINT. A complaint alleging that a car had stopped and passengers were alighting, and that plaintiff was violently thrown to the ground by the sudden starting of the car without warning while she was in the act of alighting, states a cause of action, although it is alleged that the plaintiff, on account of defective eyesight, could not know whether the car was in motion.

APPEAL—REVIEW—VERDICT. The fact that witnesses describe an accident in terms other than the exact words of the complaint is not ground for setting aside a verdict.

APPEAL—REVIEW—VERDICT. The verdict of a jury upon conflicting evidence will not be disturbed on appeal if there was some testimony to justify it.

CARRIERS—INJURIES TO PASSENGERS—DEGREE OF CARE—INSTRUCTIONS. It is proper to instruct that a street railway company, operating by electricity in the carriage of passengers, must use "the highest degree of care, skill, and diligence practicable, consistent with the operation" and it is liable for "the slightest negligence in said operation," as the latter is but a corollary of the former.

NEW TRIAL—IMPEACHING VERDICT—AFFIDAVITS. A new trial should not be granted on the affidavit of a railroad company's claim agent that a juror told him that the verdict would have been different had certain evidence been admitted or excluded, where the same is denied by the juror.

NEW TRIAL—ACCIDENT OR SURPRISE—ABSENCE OF WITNESS. A new trial should not be granted for accident or surprise on account of the absence of a material witness, where it appears that he was present on the first day of the trial, and asked to be excused to go out of the

¹Reported in 106 Pac. 476.

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state, expecting to return in time, and the adverse party offered to allow him to be sworn out of his turn, which offer was declined and the witness was excused and did not get back in time, especially where there was evidence given similar to that expected from the witness, and his absence was accounted for.

DAMAGES—PERSONAL INJURIES—EXCESSIVE VERDICT. A verdict for \$6,750 for injuries sustained by a passenger thrown to the ground in alighting from an electric car, is excessive and should be reduced to \$5,250, where it appears that the plaintiff was fifty years of age and her hip joint was fractured, resulting in the shortening of a limb one-half inch, except for which she would be fairly recovered in one year, and she was able to attend to household duties at the time of the trial.

Appeal from a judgment of the superior court for Spokane county, Kennan, J., entered March 2, 1909, upon the verdict of a jury rendered in favor of the plaintiff for \$6,750, for personal injuries sustained by a passenger in alighting from a street car. Reversed, unless \$1,500 is remitted.

H. M. Stephens, for appellant.

Nuzum & Nuzum, for respondents.

CHADWICK, J.—This is an action instituted to recover damages for personal injuries, sustained by respondent Emma A. Mueller because of the alleged negligence of appellant. It is first assigned as error that the demurrer to the complaint should have been sustained, because the complaint was drawn upon the theory that the car was in motion at the time Mrs. Mueller attempted to alight, and that because of defective eyesight she did not know, and could not by the exercise of ordinary diligence discover, that the car was in motion. This taken alone and upon technical consideration may subject the complaint to criticism, but when considered as a whole the complaint fairly states a cause of action. It is alleged, that the car had stopped and that passengers were alighting; that plaintiff was in the act of stepping to the ground when the car was suddenly started without warning, and that she was thrown violently to the ground. This was the issue tendered and accepted by ap-

pellant. The case does not fall within *Blakney v. Seattle Electric Co.*, 28 Wash. 608, 68 Pac. 1037, for there the plaintiff attempted to get off the car knowing it was in motion.

The next error assigned is that some of the witnesses had sworn that the car started with a sudden lurch or jerk, notwithstanding it was not so alleged in the complaint. It cannot be expected that witnesses will express themselves in all instances with aptness and precision, and courts should not assume to set aside the verdict of juries because they describe an incident in other words than those employed by the pleader, so long as their testimony is responsive to the main issue.

It is next contended that the overwhelming weight of the evidence is in favor of the appellant and against the respondents. There was enough evidence to warrant a verdict either way. It was the province of the jury to weigh this evidence under the direction of the trial judge, taking into consideration the manner and demeanor of the witnesses when upon the witness stand. The disputed issue of fact was resolved in favor of respondents, and we must decline to review it so long as there was some testimony to justify the verdict.

The following instruction was given by the court and excepted to as erroneous:

"You are further instructed that the defendant at the time of the alleged accident was the owner of and was operating an electric railway for the purpose of transporting passengers for hire, and was bound to exercise the highest degree of care, skill and benefits practicable, consistent with the operation of said electric railway and the cars used in operation thereof, and taking into consideration the circumstances and conditions existing at that time and place in question, in order to prevent and avoid injury to the plaintiff, if you find that the plaintiffs were passengers upon the car as alleged in their complaint, and that the defendant is liable for the slightest negligence in its operation."

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This instruction has been held to be good by this court in *Jordan v. Seattle Renton & Southern R. Co.*, 47 Wash. 503, 92 Pac. 284. The theory upon which it was held good was that it was the corollary of the admitted rule that a carrier of passengers is held to the highest degree of care.

A motion for a new trial was made, and overruled by the court. It appears that one H. D. Merritt had been subpoenaed as a witness and would have testified, that he was standing in the vestibule of the car at the time Mrs. Mueller was injured; that the car was in motion when she came upon the platform, and that the conductor and others warned her not to attempt to get off; that she did not heed the warnings, and that he attempted to restrain her, but because of the crowded condition of the vestibule, he did not reach her in time to prevent the accident. Mr. Merritt was called away and was not sworn as a witness. A claim agent of appellant filed an affidavit saying that he had called the attention of one of the jurors to what Mr. Merritt's testimony would have been had he been sworn, and that he had said that had Mr. Merritt been sworn and so testified, the verdict would have been in favor of appellant. This, and also the allegation that the same juror had said that the fact that appellant objected to the testimony of a certain Mrs. Rheimer, who had been called in rebuttal, had influenced its verdict, is denied by the juror. We think the showing is insufficient to warrant a new trial. Verdicts would hang by a slender thread if they could be thus impeached.

Neither do we think there is any showing warranting a new trial because of the failure of Mr. Merritt to testify. On Monday, the 1st day of the trial, he discovered his desire and purpose to go into the state of Montana, expecting to return so as to be able to testify on the following Wednesday or Thursday. Counsel for respondents were willing that he should be sworn out of the regular order and that his testimony be then taken. The claim agent of the company was also notified, and he in turn brought the fact of Mr.

Merritt's intended departure to the attention of counsel for appellant. Counsel for appellant took the position that he did not desire to put a witness on the stand out of his turn. Mr. Merritt was excused and went his way. He returned on the evening of the day the trial was concluded. Testimony similar to that expected of Mr. Merritt was taken. No application was made for a continuance, although Mr. Merritt's absence was accounted for by the claim agent who was sworn as a witness for that purpose. The showing does not come within any rule allowing a new trial for accident, surprise, or newly discovered evidence.

A verdict for \$6,750 was returned. This is alleged to be so excessive as to show passion and prejudice on the part of the jury. Mrs. Mueller suffered an impacted fracture of the hip joint. She was confined to her bed about eight weeks. At the time of the trial she was about on crutches. Her limb will be permanently shortened to the extent of about half an inch. The testimony shows that, in the usual order of things, she should be fairly recovered, except for the slight shortening of the limb, inside of a year. There is nothing to show an especial or continuing loss of service or unusual suffering in the future. She was able to attend to a part of her household duties at the time of the trial. She was past fifty at the time of the accident. The use of her limb will be somewhat impaired. The doctor who treated her says that he thinks that possibly in a year or a year and a half she will have what he terms "a fairly useful limb; that is, one on which she can walk, I think, in time without the use of cane or crutch." We are of the opinion that the sum of \$5,000 general damages together with the \$250 special damages allowed by the jury is ample to compensate Mrs. Mueller for the injury suffered. Beyond that the law does not undertake to go.

The case will be remanded with directions to the lower court to enter a judgment for \$5,250, provided a remission of all in excess of that sum is filed within thirty days after the re-

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mittitur goes down; otherwise a new trial will be granted. Appellant will recover costs in this court, and respondents will recover costs in the court below.

RUDKIN, C. J., GOSE, MORRIS, and FULLERTON, JJ., concur.

[No. 8369. Department One. January 8, 1910.]

THE STATE OF WASHINGTON, *Respondent*, v. SYLVESTER
KEPHART, *Appellant*.¹

WITNESSES—COMPETENCY—HUSBAND AND WIFE—CRIMES AGAINST OTHER SPOUSE—ARSON. Under Bal. Code, § 5994, disqualifying a husband or wife from testifying against the other without the other's consent, except in certain cases and in criminal cases "for a crime committed by one against another," the wife is incompetent to testify against the husband without his consent in a prosecution for the crime of arson in the burning of a barn belonging to the wife; as the offense is not a crime committed against her.

SAME. Bal. Code, §§ 7094, 7098, defining arson, and providing that a married woman commits the crime if the property set fire to belongs to her husband, creates no exception to the rule of evidence that one spouse cannot testify against the other, without the other's consent, except in prosecutions for crime committed by one against the other.

Appeal from a judgment of the superior court for Douglas county, Steiner, J., entered February 8, 1909, upon a trial and conviction of arson. Reversed.

W. J. Canton and Reneau & Clapp, for appellant.

Sam B. Hill, for respondent.

CHADWICK, J.—On the night of August 22, 1908, a barn belonging to Mildred Jane Kephart, was burned. Appellant, the husband of the complaining witness, was arrested on the next day, and was thereafter brought to trial. The

¹Reported in 106 Pac. 165.

wife was sworn as a witness, and testified over the objection of appellant, the learned trial judge observing:

"Under the terms of our statute I hold the true rule to be that where the husband is on trial for an alleged offense which, if committed, was of such a nature that it did not affect the rights of the wife in the manner different from that of other members of the general body of society, then the wife is not a competent witness against the husband, without his consent. But in all cases where the offense charged is of such a nature that, if committed, it was a direct and specific invasion of the wife's personal property rights, then the wife is a competent witness against her husband."

A careful reading of the testimony confirms the observation of the prosecuting attorney that, without the testimony of the wife of the defendant, no conviction can be had. In the case of *State v. Kniffen*, 44 Wash. 485, 87 Pac. 837, 120 Am. St. 1009, a bigamy case, the statute, Bal. Code, § 5994, which disqualifies a wife as a witness against her husband, was under consideration. After noting the conflict of authority in the application of this statute, the court said:

"In *Bassett v. United States*, *supra* [137 U. S. 496], the supreme court of the United States considered the cases cited above from Minnesota, Texas, Iowa and Nebraska, and concluded that a statute similar to our own was but an affirmation of the common law rule, and polygamy was a crime against the marriage relation, and not one committed by one spouse against the other. While much may be said in favor of the position that bigamy, adultery, and kindred crimes are committed by one spouse against the other, yet the weight of authority seems to be opposed to that rule. 30 Am. & Eng. Ency. Law (2d ed.), p. 956. We therefore feel bound to hold that in this case the court erred in permitting the first wife to testify against her accused husband."

We have been treated to a scholarly discussion of this subject by the prosecuting attorney, who reviews the history of our statute and undertakes to make plain that the words "nor in a criminal action or proceeding for a crime

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committed by one spouse against the other" were used advisedly, and with intent to change the rule of the common law and of the statutes in some of the other states wherein it is expressly provided that a husband or wife shall not testify for or against each other, "except with the consent of both or in case of criminal violence upon one by the other." This court, in company with most respectable authority, has decided that such statutes are declaratory of the common law. This being so, the wife could not testify in any case to which the husband was a party, unless the case falls within some statutory exception to the rule itself.

The point is made that Bal. Code, §§ 7094 and 7098, defining the crime of arson and providing that a married woman "who shall commit the crime may be punished therefor though the property set fire to may belong partially or wholly to her husband," creates an exception. It is said that the latter section makes it certain that it was the intention of the code makers to place the wife upon the same plane of criminal responsibility as her husband for every arson committed by her, and that the rational conclusion follows that, in order to make the statute effective, the husband must have the right to testify against the wife, § 7098 working, as it were, an implied exception to § 5994, and that the bar being raised in such cases as to the husband, it was of course raised as to the wife when the crime was committed under the same circumstances.

Courts are not warranted in changing rules of evidence to meet some theory of the law, however attractive it may be. The statute relied on was passed because it was held in the case of *Rex v. March*, 1 Moody 182, that a wife was not guilty of the crime of arson when the property destroyed belonged to her husband. This decision has no foundation in reason, but it has called for legislative expression in most of the states where the common law prevails. The decision did not, nor do we know of any statute enacted because of it which makes any exception to the rule of evidence which we

now have before us. Notwithstanding the engaging argument made by Mr. Wigmore, and some case writers to which we have been referred, that the application of the common law rule should be outlawed by reform, courts should not lightly throw away a rule which is the growth of a practical attempt to find the truth in favor of a theory based upon the independence of a husband and wife, the one of the other. If there is any reason for the rule except in the case of personal violence, it must exist in all cases; for the reason underlying it rests, not upon the character of the case, but upon the relation of the parties. As Mr. Greenleaf, a writer who, as contradistinguished from Mr. Wigmore, had met the law in action and is regarded as at least equally competent as an authority, has said, "the principle of the law requires its application in all cases in which the interest of the other party is involved." Exceptions can only be worked where, as was said by Lord Mansfield in *Bentley v. Cooke*, 3 Douglas 422, there is some necessity, "not a general necessity, as where no other witness can be had, but a particular necessity, as where, for instance, the wife would be otherwise exposed without remedy to personal injury."

Public policy, as at present defined, demands, on the one hand, that the sanctity and harmony of the marital relation be preserved; and on the other, it insists that one spouse shall not maintain a suit, or, unless within a recognized exception, be deprived of his liberty or his property, by the testimony of the other. Experience has taught us that in most cases where the testimony of the husband or wife is taken for or against the other, the truth is obscured and justice hoodwinked. There is nothing more dangerous to truth than testimony prompted by conjugal affection, unless it be the echoes of a shattered home where love has flown and hatred broods expectant for the fray. These are the reasons underlying the common law rule, a rule wisely fixed to meet the actual questions and conditions confronting

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society as well as the courts. It may be, as counsel says, the rubbish of antiquated and superseded systems of jurisprudence, but the time has not yet come when we can with safety substitute for the opinions of the sages of the law the vision of the theorist, based upon the idea that husband and wife are above the restraints and influences of affection, hope, fear, jealousy, and hatred, emotions sustaining or too frequently growing out of the marriage relation. The rule may be imperfect, but it is made to fit the imperfections of man, and has been found to be practical. Though justice may be defeated in the few cases, it is subserved in the many. We have not discussed cases in this opinion. The rule we adhere to is sustained by an overwhelming weight of authority. They may be found in the encyclopaedias, digests, and text-books. The necessity of the rule is familiar to every practitioner, and there are few judges who will require any authority or argument to persuade them of the wisdom of the common law rule.

Reversed and remanded.

RUDKIN, C. J., FULLERTON, MORRIS, and GOSE, JJ., concur.

[No. 8373. Department One. January 8, 1910.]

NORTH AMERICAN DREDGING COMPANY, *Appellant*, v. C. J. TAYLOR, *as Treasurer of Chehalis County, Respondent*.¹

TAXATION — PERSONAL PROPERTY — SITUS — STEAM DREDGER. A dredger built in, and engaged for two years in government work in, a county of this state, has its situs for taxation in this state, although its home port and ownership is in another state; and the fact that it was seaworthy and had sufficient power to propel itself on the high seas does not bring it within the rule requiring vessels engaged in interstate traffic or sailing from one port to another to be assessed at their home ports or the domicile of her owners.

SAME—OWNERS—INTENTION TO REMOVE FROM STATE. The use of a dredger for indefinite periods in a harbor where it may be engaged in

¹Reported in 106 Pac. 162.

work impresses it with a local character, and the declared intention of its nonresident owners to remove it from the state as soon as its contract for work is completed, does not exempt it from taxation at the place where found.

Appeal from a judgment of the superior court for Chehalis county, Irwin, J., entered June 1, 1909, in favor of the defendant, upon an agreed statement of facts, dismissing an action to enjoin the seizure and sale of personal property to satisfy a tax. Affirmed.

W. H. Abel, for appellant.

Wm. E. Campbell and *J. L. McMurray* (*H. G. Rowland*, of counsel), for respondent.

CHADWICK, J.—The steam dredger "Pacific" was built at Tacoma, in Pierce county, Washington, in the year 1903, and was from that time until about April 7, 1905, almost continuously engaged in dredging, or was lying in the harbors of Pierce county. In the year 1904, appellant listed the dredger and its equipment for taxation in Pierce county, and thereafter paid the taxes for that year. The property was also listed by the superintendent in charge for the year 1905. On April 1, 1905, and for some time prior thereto, appellant had been engaged in the performance of a government contract in the harbor at Tacoma. This contract expired on March 1, 1905, and was completed under an extension agreement. On April 9, 1905, the Pacific was taken, with all its equipment and appliances, to Honolulu, in the Hawaiian Islands, by way of San Francisco, California, there to be engaged for a definite period. The dredger was a sea-going, self-propelling vessel. On or about November 2, 1907, the dredger was brought from without the state of Washington to Grays Harbor, in Chehalis county, and was there engaged in dredging the harbor under a contract with the United States government, expiring on or before the 15th day of October, 1908. On or about March 5, 1908, the respondent, as treasurer of Chehalis county, was about to

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seize and sell the Pacific with all equipment, appurtenances and appliances, under a writ issued by the treasurer of Pierce county, when he was restrained by an order of the superior court of Chehalis county.

The fact is further stipulated that the person who signed the detail list for 1905 was the superintendent of the dredger, having authority to purchase supplies, contract for repairs, to employ labor, and issue time checks for the payment of labor, and that, if the officers of appellant were present, they would testify that the superintendent had no authority to list the said property for taxation. It also appears that in 1903 the dredger was temporarily enrolled in the office of the collector of customs at Tacoma, under a carpenter's certificate; that the home port of the dredger was given at that time as Camden, New Jersey; that the name and port were painted on the stern of the dredger, as required by law, just prior to her sailing for San Francisco. This was done under an order of the shipping commissioner. The fact is also stipulated that at all times during the performance of the government contract in Tacoma harbor, it was the intention of the appellant to remove the dredger from Tacoma and from the state of Washington as soon as the government contract should be completed. Upon the hearing in the court below, the prayer of appellant for a restraining order was denied, and judgment was entered in favor of respondent.

Error is assigned as follows:

"(1) It was error to hold that the 'Pacific' had a situs in 1905, for purposes of taxation, within the state of Washington.

"(2) Appellant was deprived of its property without due process of law, contrary to Art. 14 of the Federal Constitution.

"(3) It was error to render judgment, denying an injunction and sustaining the validity of said tax."

If the trial court was right in holding the state of Washington to be the situs of the property, that fact is de-

cisive of the case, as the second and third assignments are only incidental thereto. It is the general rule that vessels engaged in state or interstate traffic with no established situs, but going in and out of a port upon a fixed run or as the necessities of the business engaged upon may demand, or when engaged upon no fixed schedule, but sailing from one port to another as a carrier of state, interstate, or international traffic, shall be assessed at the home port, or at the domicile of the owner. *Northwestern Lumber Co. v. Chehalis County*, 25 Wash. 95, 64 Pac. 909, 87 Am. St. 747, 54 L. R. A. 212; *Ayer & Lord Tie Co. v. Kentucky*, 202 U. S. 409; *Commonwealth v. American Dredging Co.*, 122 Pa. St. 386, 15 Atl. 443, 9 Am. St. 116, 1 L. R. A. 237; *California Shipping Co. v. City and County of San Francisco*, 150 Cal. 145, 88 Pac. 704; *Olson v. City and County of San Francisco*, 148 Cal. 80, 82 Pac. 850, 113 Am. St. 191, 2 L. R. A. (N. S.) 197; *Johnson v. De Bary-Baya Merchants' Line*, 37 Fla. 499, 19 South. 640, 37 L. R. A. 518; *American Mail Steamship Co. v. Crowell* (N. J.), 68 Atl. 752; *People ex rel. Pacific Mail Steamship Co. v. Commissioners etc. of New York*, 58 N. Y. 242.

However, a vessel may be assessed without reference to the home port or the residence of the principal owner or agent, when it is put to such use as to impress it with a local character. *National Dredging Co. v. State*, 99 Ala. 462, 12 South. 720; *McRae v. Bowers Dredging Co.*, 90 Fed. 360; *Galveston v. Guffey Petroleum Co.* (Tex. Civ. App.), 113 S. W. 585; *State v. Higgins Oil & Fuel Co.* (Tex. Civ. App.), 116 S. W. 617; *Old Dominion Steamship Co. v. Virginia*, 198 U. S. 199; *Id.*, 102 Va. 576, 46 S. E. 783, 102 Am. St. 855. It has been held that the declared intention of the owner concerning the future use or removal of personal property will not exempt it from taxation. *Stoddart v. Ward*, 31 Md. 562.

The Pacific was built in Pierce county, and never had any other situs. The character of its use was not such as to bring it within the rule allowing taxation at the home port

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or at the home of the owner or agent. That rule applies only when the use is transitory. The true rule is stated in *National Dredging Co. v. State, supra*, wherein the court said:

"It [the dredger] is here as any other property is or would be here in use upon the public works in Mobile bay. Its use in that work is the same as that of the other property originally embraced in this assessment, and formerly owned by a citizen of Alabama, and by him devoted to this work during previous years, the same as that of the scow which was built in Mobile for this work and has never been beyond the state, and the same as that of another scow built outside of the state for this work. All this other property is property of the state or in the state for the purposes of taxation, though it may at some uncertain future time cease to be property taxable here in consequence of its removal to other jurisdictions, as the property in controversy may some time be carried out of the state. Until that happens, however, both classes of property enjoy the same protection of our laws; both classes are devoted to the same use, the continuation of each class within the state is alike indefinite—the one class cannot, in short, be distinguished from the other in any characteristic which is of importance in determining the question of taxability *vel non*; and hence our conclusion that the property in controversy had become so incorporated with, and a part of, the tangible property of this state, for revenue purposes, as that its taxable *situs* is here notwithstanding the fact that the domicile of its owner is in another state. *Mayor of Mobile v. Baldwin*, 57 Ala. 61; *Boyd v. City of Selma*, 96 Ala. 144, 11 South. 393; *Burroughs on Taxation*, pp. 40, 41; *Trammell v. Connor*, 91 Ala. 398, 8 South. 495. There is nothing in the nature of this particular property to take it out of the general principle. The fact that it is floating property, and may be moved from place to place and port to port by water, furnishes no more reason for exempting it from taxation here than would exist for the exemption of property which did not float, and could be moved from place to place only overland."

There must be some reasonable limit to the rule that overcomes the ordinary rule of situs when applied to such

property, and we think it must be found in the answer to the question whether the presence in Pierce county of the dredger was temporary or merely indefinite. If the former, it would probably not be taxable. If the latter, it would be, so long as it was there at a time when the levy was made and the lien attached. Otherwise the property might remain an indefinite time running over the period of a dozen contracts, or so long as it found profitable employment, and yet be exempt from taxation, although during the whole time the property would receive the protection of the local laws. If the intention merely were allowed to control, we opine that property of this character would never be taxed, unless the conscience of the owner moved him to list it at the home port or at his domicile, which under the facts of this case he would not be bound to do. *American Mail Steamship Co. v. Crowell, supra.*

The exceptions to the precept that property shall be assessed at the place where found either depends upon a statute or results as a rule of necessity to the state and of protection to the owner. Otherwise property would escape taxation altogether, or be subject to a tax wherever it might be found, thus leading to double taxation. No statute is relied upon in this case, and we find none of the elements of necessity which moved the courts in pronouncing the decisions announced in the cases first cited in this opinion. While the Pacific was a sea-going vessel in the sense of being seaworthy and having sufficient power to propel itself over the high seas, it is not engaged, and it never was intended that it should be engaged, in commerce on the high seas, or to sail from port to port as a carrier in inland waters. The purpose for which it was constructed demands that it remain for indefinite periods in whichever harbor it may be engaged. Its character and its use give it a situs, and that situs must be held to follow its physical presence, and the power to tax cannot be overcome by any intention to remove it at a future time, be it greater or less, or because

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of its sea-going qualities. It comes within the same category as a pile driver or a switch engine, or other property of like character and use.

The judgment is affirmed.

RUDKIN, C. J., FULLERTON, MORRIS, and GOSE, JJ., concur.

[No. 8168. Department One. January 8, 1910.]

ETTA MAY NELSON, *Respondent*, v. GEORGE V. NELSON,
Appellant.¹

JUDGMENTS—VACATION—MOTION—TIME. A motion to vacate a judgment for alimony and division of property, because contrary to the stipulation of the parties, is too late when not made within one year after entry of the judgment, as required by Bal. Code, §§ 5155, 5156.

JUDGMENTS—VALIDITY—PLEADING—PRAYER FOR RELIEF—SCOPE. A decree is not void as going beyond the specific relief prayed for in the complaint, where the complaint prayed for both specific and general relief, and the decree was within the allegations and prayer for general relief.

JUDGMENTS — VACATION — APPLICATION — DILIGENCE. Under Bal. Code, § 5154, requiring diligence in one seeking relief from an oppressive judgment, an application to vacate a judgment for alimony, etc., is properly denied, where nothing was done for ten months after notice of the judgment, the motion was not filed until within three days of the expiration of the year allowed therefor, and there was no excuse or explanation offered for the delay.

Appeal from orders of the superior court for Franklin county, Zent, J., entered November 17, 1908, and January 2, 1909, denying motions to vacate a decree for alimony etc., and to grant a rehearing. Affirmed.

Granville G. Ames, for appellant.

Herman Murray, for respondent.

FULLERTON, J.—On October 24, 1907, in an action brought in the superior court of Franklin county, the re-

¹Reported in 106 Pac. 138; 107 Pac. 195.

spondent obtained a decree of divorce against the appellant, in which decree she was awarded a tract of land, situated in Franklin county, an attorney's fee of \$75, and alimony at the rate of \$20 per month, commencing with the month of December, 1907. On November 2, 1908, the appellant filed a motion, supported by affidavits, asking a modification of the decree in so far as it related to the real property, attorney's fee, and alimony, averring that the decree in these respects violated a stipulation of the parties settling their property rights entered into prior to the time the decree of divorce was granted. This motion, after a hearing had thereon, the court denied, entering its order to that effect on November 17, 1908. On January 2, 1909, the appellant moved for a rehearing of the motion filed November 2, 1908, supporting the last motion by the affidavit of his counsel to the effect that the trial court denied counsel the privilege of arguing the motion to the court or presenting to the court authorities in support thereof. This motion was also denied, and this appeal was taken on February 13, 1909, from the order refusing to modify the judgment, and the order refusing to grant a rehearing.

The respondent contends that the appellant is not entitled to have the motion to modify the judgment considered for the reason that it came too late, not having been filed within one year after the entry of the judgment. This contention we think is well taken. The statute relating to the vacation and modification of judgments provides that proceedings therefor, whether by petition or motion, except in certain specified cases, of which this is not one, shall be commenced within one year after the entry of the judgment. Bal. Code, §§ 5155, 5156. By referring to the dates above given it will be observed that more than a year elapsed between the entry of the decree of divorce and the filing of the motion to modify the same. We hold therefore that it came too late.

The appellant contends further, however, that the part

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of the decree sought to be modified is void, and hence open to attack by motion at any time; thus rendering it immaterial whether the motion to modify came within the year or not. The ground upon which this contention is based is that the decree granted relief beyond that prayed for in the complaint. But an inspection of that pleading does not support this contention. The complaint, after setting forth the property of the parties, prayed for both specific and for general relief. The decree goes beyond the specific relief asked, but is well within the allegations of the complaint and the prayer for general relief. Whether the judgment is for that reason voidable we need not determine, but we are clearly of the opinion that it is not void.

The orders appealed from will stand affirmed.

RUDKIN, C. J., CHADWICK, GOSE, and MORRIS, JJ., concur.

ON REHEARING.

[Decided February 25, 1910.]

PER CURIAM.—The appellant asks for a rehearing in the above cause for the reason, as he asserts, that the court made an error in assuming that more than a year had elapsed between the entry of the decree of divorce and the filing of the motion, whereas the motion was filed three days before the year expired, the decree of divorce having been in fact rendered on November 5, 1907, instead of October 24, 1907, as stated in the opinion filed. A re-examination of the record convinces us that a mistake on our part may have been made in this regard, but we think nevertheless that the orders appealed from should stand affirmed.

It appears from the record that the appellant had knowledge of the contents of the judgment as early as January 16, 1908, having made an affidavit on that date apparently as the basis upon which to ask some form of relief therefrom, yet he did not actually move in that behalf until more than ten months later; nor is there any excuse offered to explain the delay. The statute (Bal. Code, § 5154) requires that an

applicant seeking relief from what he deems an oppressive judgment shall proceed with diligence, and such has been the uniform holdings of this court. The rule was announced as early as the case of *Bozzio v. Vaglio*, 10 Wash. 270, 38 Pac. 1042, and reaffirmed in the cases of *Kuhn v. Mason*, 24 Wash. 94, 64 Pac. 182; *Fisher v. Puget Sound Brick etc. Co.*, 34 Wash. 578, 76 Pac. 107; *Warren v. Hershberg*, 52 Wash. 38, 100 Pac. 149, and *Kline v. Galland*, 53 Wash. 504, 102 Pac. 440. The case of *Kuhn v. Mason* was somewhat similar in its facts to the one at bar. There the applicant had delayed making his application to vacate the judgment until within three days of the time the year expired, and no excuse was shown for the delay. After referring to the case of *Bozzio v. Vaglio*, this language was used:

“And certainly, under the doctrine announced there [*Bozzio v. Vaglio*], we are not able to find that the court abused its discretion in this case in not granting the petition to vacate when the year of limitation was within three days of expiration, without any showing of diligence whatever, or any reason why the petition had not been made before. It is not the policy of the law to disturb judgments, after a long time had elapsed, without good reason being shown for such delay. In addition to this, it is not the intention of the law that the motion to vacate shall take the place of an appeal, and, under the provisions of this petition, if the court did not act in accordance with the law, its failure was purely error, which ought to have been appealed from.”

On any view of the case, therefore, the orders appealed from must be sustained. The petition for rehearing is denied.

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Opinion Per FULLERTON, J.

[No. 8200. Department One. January 8, 1910.]

H. DAHLSTROM *et al.*, *Appellants*, v. JOHN S. ANDERSON,
Respondent.¹

HIGHWAYS—COUNTY ROADS — ESTABLISHMENT — EVIDENCE—SUFFICIENCY. The evidence is insufficient to show the establishment of a county road over certain lands, where the county commissioners' record of an order establishing the road was so indefinite that it could not be located with reference to the government subdivisions, and an engineer's projection of the field notes of the survey did not bring the road within 100 feet of the land in question, and there was no proof that the road as opened by the supervisors passed over the land.

SAME. Proof of user, in early times, of a road as a public highway, is not proof of establishment of a county road over the tract by county officers.

HIGHWAYS—ESTABLISHMENT—PRESCRIPTION. A public highway by prescription over certain lands is not established by proof that, in an open country, a road had been used in the general direction claimed, changes having been made in the travel as the country settled up until the whole section was platted, with streets and cross streets, and at the time of the trial the change in travel was so complete that no part of the original way remained in existence unless over the particular strip, public buildings and dwellings having been built in the road as shown by the earlier maps, portions of it having been fenced, and no part of it having been used as a road for many years.

Appeal from a judgment of the superior court for King county, Morris, J., entered February 20, 1909, upon findings in favor of the defendant, dismissing an action for an injunction. Affirmed.

Reynolds, Ballinger & Hutson, for appellants.

Bo Sweeney, for respondent.

FULLERTON, J.—In this action the appellants sought to enjoin the respondent from enclosing a tract of ground claimed to be a public highway. Without the use of maps, which cannot well be reproduced here, it is somewhat difficult

¹Reported in 106 Pac. 127.

to make clear the situation; but it appears that in 1880 a petition was presented to the board of county commissioners of King county praying for the establishment of a county road, "commencing in the center of the road near the outlet of Lake Union, and running thence in a northwesterly direction on the most practical route" over a generally described course terminating at "salt water near the mouth of Salmon Bay." The board of county commissioners entertained the petition, and appointed viewers and a surveyor to lay out and survey the road. The persons so appointed acted in their several capacities, and proceeded to, and did, lay out and survey a road along a route following the general direction of the route described in the petition, subsequently making a report of their doings to the commissioners, who ordered the road established and directed the supervisor of the road district in which the proposed road lay to open the same.

The report of the viewers and surveyor is quite as indefinite as the petition for the road, and it is impossible to tell from the report, or the field notes of the surveyor accompanying the report, the location of the road with reference to the government surveys, or with reference to any natural or artificial monument with which the government surveys are connected. What was done by the supervisor towards opening the road does not appear, but the people for a number of years used a way as a wagon road and for horseback and foot travel running in the general direction of the surveyed road.

Some years after the survey the owner of a part of the land over which the road passed platted the same into blocks, seemingly without regard to the road thought to have been established by the proceedings above mentioned. This plat was called "Farmdale Homestead," and while it showed a county road extending across it, the road shown does not correspond in its courses or distances with the field notes of the surveyed road. In 1889, the owners of the Farm-

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dale tract conveyed the greater part thereof to other persons, who procured a vacation of the part of the Farmdale plat purchased by them, and replatted it into streets, lots, and blocks under the name of "Gilman Park." In replatting the tract, the dedicators seem to have trenched upon a part of the Farmdale Homestead tract not conveyed to them, for in the final adjustment it was found that block 59 of the Gilman Park plat included land properly a part of block 49 of the Farmdale Homestead plat, which was among the reserved blocks.

The block in Gilman Park was 550 feet in length, east and west, by 200 feet in width, north and south, and was divided into 22 lots, numbered from 1 to 11 from west to east on the northern tier, and 12 to 22 from east to west on the southern tier. The north line of block 49 of the Farmdale Homestead tract was found to cross the south line of block 59 of the Gilman Park tract near the southeast corner of lot 17 therein, and extend in a northwesterly direction, crossing the west line of the block near the southwest corner of lot 1, thus making fractional lots 17, 18, 19, 20, and 21, and obliterating 22 almost entirely.

Some time prior to the commencement of this action, the appellants became the owners by purchase of fractional lots 19, 20, and 21, and the west half of lot 18, in block 59, Gilman Park, and erected dwellings thereon. At the time of the purchase, that part of block 49 of the Farmdale Homestead tract lying in block 59 of the Gilman Park plat was open, and the appellants and their tenants had access to the street on the south of the block by passing over the unenclosed land. Later on, however, the respondent purchased fractional lot 17, and the east half of lot 18 together with that part of block 49, which lay immediately south of these lots and enclosed the tract purchased with a fence. The effect of this was to cut off the appellants and their tenants from the acknowledged public highways, and they thereupon instituted this action.

The appellants contend that the county road attempted to be established by the county commissioners of King county in 1880, as originally marked on the ground, followed the north line of block 49 of the Farmdale Homestead tract, lying wholly upon that block, and that it was kept open and used by the public as a highway from the time of its original location until it was closed by the respondent; and is, consequently, a public highway both in virtue of the fact that it was laid out and established as such by the county commissioners of King county, and by prescription, it having been used by the public as such for a period of time much longer than the period of the statute of limitations.

As to the first contention, if it could be said that the proceedings had before the King county commissioners established a road at all, the proof does not show that the tract fenced by the respondent formed a part of it. The only evidence on the question is the testimony of an engineer called by the appellants themselves. He stated that the road, as he projected it from the field notes returned by the surveyor, did not come closer than 105 feet of this particular tract. Nor is there any evidence that the road as opened by the supervisor under the order of the county commissioners passed over this particular tract. There was some evidence, it is true, that in the earlier times this particular tract had been used as a public way both for wagons and pedestrians, but this is not proof of the establishment of a county road over the tract by the duly constituted county officers. If it were conceded, therefore, that the very indefinite record made by the county commissioners was sufficient to establish a lawful county road, we could not find that the road so established passed over the particular tract in question here.

The evidence to the effect that a public way over the tract had been established by use is much stronger, but we do not think it possesses that certainty required in such cases. When travel first began along the route over which the road was attempted to be established, the country was open and re-

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mained so in its greater part for a considerable period of time. During this period the travel seems to have followed substantially one general way; but as the country gradually settled up, changes were made in it to suit the convenience of the settlers, seemingly without regard to the claim that the public had a right to a particular way. This change was so complete that at the time of the trial no part of the original way, unless the particular strip in question here be an exception, remained in existence as a way. Indeed, it was shown that many of the buildings, and among them the city hall of the city of Ballard, were erected on the line of the road as it was shown on some of the earlier maps, and that a public school building of the same city was erected in what was once the traveled way. Then again, the entire way through this particular block had not been opened for a number of years. It was shown that former owners of that part of block 49 lying immediately west of the tract here in question closed it for travel to the public at its western extremity several years prior to the trial, without protest from any of the public authorities, and that they left that part of it open which is now the property of the respondent for their own convenience, permitting such use of it as was made by the public through sufferance rather than as a matter of right. Moreover, there has been no demand for this particular tract as a public way for many years. The surrounding country has long been platted into lots and blocks, with streets and cross-streets open to public use, and these streets now furnish, and have long furnished, all necessary ways for the public at large. The foregoing facts seem to us to argue conclusively against the claim of a public way, and as the appellants do not contend that they have individually a right of way over it, we think the judgment should stand affirmed, and it will be so ordered.

RUDKIN, C. J., CHADWICK, and GOSE, JJ., concur.

MORRIS, J., took no part.

[No. 8221. Department One. January 8, 1910.]

MYRTLE F. BRIGGS, *Respondent*, v. MARION W. BRIGGS,
Appellant.¹

DIVORCE—GROUNDS—RENDERING LIFE BURDENSOME—COMPLAINT—SUFFICIENCY. A complaint for a divorce on the ground of personal indignities rendering life burdensome states a cause of action when it alleges that the husband applied profane and vulgar language to the wife and was guilty of cruelty consisting of physical violence.

DIVORCE—DEFENSES—INDISCREET CONDUCT OF WIFE—CONDONATION. A divorce for misconduct of the husband should not be denied a wife because of indiscreet or disgraceful acts committed by the wife in the husband's presence and with his approval.

Appeal from a judgment of the superior court for Snohomish county, Black, J., entered February 1, 1909, upon findings in favor of the plaintiff, in an action for a divorce, after a trial on the merits. Affirmed.

E. C. Dailey, for appellant.

J. Y. Kennedy, for respondent.

FULLERTON, J.—This is an action for divorce, brought by the respondent against the appellant, charging cruel treatment and personal indignities rendering life burdensome. The respondent, in addition to a decree of divorce, asked to have awarded to her the custody of their minor child, a boy some six years of age, and certain community personal property, of which she was in possession, of the value of some three hundred dollars. The appellant answered the complaint, denying the acts of cruelty and personal indignities charged against him, and by a cross-complaint sought a divorce on the ground of adultery committed by the respondent, also asking that he be awarded the custody of the child. The cross-complaint was put in issue by a reply, and a trial was had, resulting in a divorce in favor of the respondent, on the grounds stated in her complaint, and the

¹Reported in 106 Pac. 126.

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awarding to her the custody of the child, and the community property before mentioned. The husband appeals.

The appellant insists, first, that the complaint does not state facts sufficient to constitute a cause of action, but the complaint is ample in this respect. The personal indignities alleged consisted of the use of profane and vulgar language applied to the respondent, and the cruelty of physical violence. These are sufficient causes for divorce when proven.

It is next insisted that the allegations of the wife's complaint are not proven, other than in certain instances where they were invited by the wife's own misconduct, but that the husband's allegations against her are abundantly substantiated. But we are inclined to follow the trial court's conclusions with reference to the evidence. The charges the wife makes are practically admitted, although an effort was made to explain them away. On the part of the wife, there is much in her conduct that is coarse, and some matters that are disgraceful—matters that, had they occurred at other times and places and under different circumstances, would legitimately lead to the conclusion that her character was that of a bawd rather than that of a virtuous woman; but her acts are robbed of this construction by the fact that the most flagitious of them occurred in the presence of her husband, and apparently received his approval. What is shown of her conduct away from his presence, while it was not always the most discreet, falls far short of convicting her of the revolting charge the husband makes against her.

But it is unnecessary to pursue the inquiry further. The judgment of the trial court is right and will stand affirmed.

RUDKIN, C. J., CHADWICK, GOSE, and MORRIS, JJ., concur.

[No. 8053. Department Two. January 8, 1910.]

CARL J. THOMPSON, *Respondent*, v. A. J. ALLEN, *Appellant*.¹

MARITIME LIENS—FOR WORK ON VESSEL—SHIPPING—"TACKLE,"
WHAT IS. The work of repairing a gasoline engine belonging to A., at A's request, and installing it in a boat belonging to M., with M's consent, for the purpose of trial and with a view to a possible sale of the engine to M., is not work or labor upon a "vessel, her tackle, apparel," etc., within Bal. Code, § 5953, whereby the laborer could acquire any lien upon the boat or engine, he having knowledge of the aforesaid ownership and purposes, and the contemplated sale not taking place on account of the rejection of the engine by M. and its removal from the boat by A.

MARITIME LIENS—FORECLOSURE—FAILURE OF LIEN—PERSONAL JUDGMENT. In an action to foreclose a lien on the tackle, apparel, etc., of a vessel, on the failure of the lien, there can be no personal judgment against the defendant owner, where he did not waive his rights in that respect, and contested the claim for a lien and for personal judgment against him, not only on the merits, but also by reason of the form of the action.

Appeal from a judgment of the superior court for Pacific county, Rice, J., entered January 26, 1909, upon findings in favor of the plaintiff, after a trial on the merits before the court without a jury, in an action to foreclose a lien on a vessel, her tackle, apparel, etc. Reversed.

Chas. E. Miller, for appellant.

H. W. B. Hewen, for respondent.

PARKER, J.—This is an action to foreclose a lien claimed by plaintiff upon a boat and certain machinery, consisting of a 15-horse power gasoline engine, alleged to be a part of her tackle, apparel and furniture. The action is founded upon Bal. Code, § 5953, which provides:

"All steamers, vessels, and boats, their tackle, apparel, and furniture, are liable, . . . (3) For work done or material furnished in this state, for their construction, repair,

¹Reported in 106 Pac. 173.

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or equipment, at the request of their respective owners . . .”
And, also, Bal. Code, § 5954, which provides:

“Such liens may be enforced, in all cases of maritime contracts or service, by a suit in admiralty, *in rem*, and the law regulating proceedings in admiralty shall govern in all such suits; and in all cases of contracts or service not maritime, by a civil action in any district court in this territory.”

The rights involved in this appeal are only those of plaintiff and defendant Allen, and the facts shown by the record upon which those rights depend are practically undisputed; and in so far as necessary to be noticed, are as follows: Defendant Allen is the owner of a 15-horse power gasoline engine, and defendant Miller is the owner of a boat about 27 feet long and 7 feet wide. Plaintiff is a mechanic somewhat skilled in the repairing of such engines and boats, and was employed by defendant Allen to repair the engine with a view to selling it to defendant Miller to install in his boat as the motive power thereof. Plaintiff was the means of bringing the two defendants together, looking to a proposed sale of the engine. In addition to repairing the engine, he also installed it in the boat at the instance of defendant Allen and by the consent of the defendant Miller, for trial. This was all done in June and July, 1908. The defendants never agreed upon or consummated the sale, Miller claiming the engine was not satisfactory, and being unwilling to pay the price asked by Allen.

On August 14, 1908, defendant Allen removed the engine from the boat, defendant Miller making no claim to it. A few days thereafter, on August 22, plaintiff commenced this action to foreclose his claim of lien for his work upon the engine, in which he prays for personal judgment against Allen only, for the amount of his claim, and that the same be declared a lien upon the boat and engine, the latter of which he claims to be a part of the boat, her tackle, apparel, and furniture. Upon a trial of the cause before the court without a jury, it being treated as being on the equity side of the court, personal judgment was rendered against Allen which was declared to be a lien upon the boat and engine as prayed

for, and the court ordered that, in making the sale of the property to satisfy the judgment, the engine belonging to defendant Allen should be first sold; and if that did not yield sufficient to satisfy the claim, then that the boat be sold. From this judgment and order defendant Allen has appealed.

The principal question presented by the assignments of error is, Does the statute above quoted give respondent a lien upon the engine belonging to appellant for the services rendered in the repair and installation thereof in the boat, under the facts shown by this record? and this question manifestly depends upon the question of whether or not the engine ever became a part of the boat, her tackle, apparel or furniture. Appellant contends that the engine never became a part thereof, while respondent contends to the contrary. It is plain from the undisputed facts that the ownership of the boat and the ownership of the engine never became united, nor was the engine placed in the boat with a view to remaining there and becoming a part thereof, under the ownership of appellant, either separately or united with that of defendant Miller. In other words, it was never contemplated that appellant should, to any extent, become the owner of any share in the boat or any part of her tackle, apparel or furniture. The engine was not repaired or installed in the boat for any such purpose, but solely with a view of a possible sale of the engine, which never occurred, and which respondent knew might never occur when he was performing labor upon the engine and its installation. Respondent himself testified, among other things, "Mr. Allen spoke to me about fixing it, before he knew anything about putting it into this boat at all; supposed to fix it up and put it in running shape, so it was capable of being sold later on; then Miller figured on it and I put it in his boat for trial." In view of these facts we are of the opinion that the services of respondent in the repairing and installation of the engine was not "work done or material furnished" for the "construction, repair or equipment" of the boat, and therefore he did not acquire any right

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to a lien upon the engine by virtue of the statute above quoted. This view leads to a reversal of the judgment of foreclosure so far as it assumes to foreclose the lien upon the engine belonging to appellant.

What, then, becomes of the personal judgment rendered against appellant? This court has heretofore recognized that the foreclosure of a lien of this nature is an ordinary civil action of foreclosure upon the equity side of the court (*Washington Iron Works v. Jensen*, 3 Wash. 584, 28 Pac. 1019; *Callahan v. Aetna Indemnity Co.*, 33 Wash. 583, 74 Pac. 693), which makes the action substantially of the same character as in the foreclosure of mechanics' liens. In the latter class of actions it has been held by this court, in common with most others, that there can be no personal judgment in such a lien foreclosure for the sum which the court may find due when the right for the lien fails. This is apparently upon the theory that a defendant cannot be compelled to submit to a trial of his personal liability in an action which is in form equitable when the equitable claims made in the action fail. To compel him to so submit would be to take away his right of trial by jury. *Hildebrandt v. Savage*, 4 Wash. 524, 30 Pac. 643, 32 Pac. 109. It is true that in such a foreclosure proceeding the defendant may waive his rights in this respect to such an extent that the court may render a personal judgment against him, even though the plaintiff's equitable cause, to wit, the foreclosure of his lien, may fail. We do not think that in this cause the defendant has waived his rights in this respect. The theory of his defense, made manifest in this record at various stages of the cause, was that the court had no lawful right to render either a judgment of foreclosure against his engine or a personal judgment against him. The latter contention was made not only upon the merits, but also by reason of the form of the action.

We are of the opinion that the judgment of foreclosure, and also the personal judgment, must be reversed. The cause

is therefore remanded to the superior court, with instructions to dismiss the same, without prejudice, however, as to respondent's right to sue for the value of his service.

RUDKIN, C. J., MOUNT, CROW, and DUNBAR, JJ., concur.

[No. 8063. Department Two. January 8, 1910.]

F. M. JEFFERY, *Respondent*, v. HIRAM C. GILL, *Appellant*.¹

LIBEL AND SLANDER—WORDS IMPUTING CRIME INVOLVING MORAL TURPITUDE—CONSTRUCTION—SUBMISSION TO JURY. Defendant's statement that plaintiff left his wife in the east on her deathbed and came west with a whore, is capable of a construction imputing the criminal offense of living in a state of adultery and involving moral turpitude; and it is accordingly not error, as against the defendant, to submit to the jury the question whether it did impute such crime.

Appeal from a judgment of the superior court for King county, Albertson, J., entered November 25, 1908, upon the verdict of a jury rendered in favor of the plaintiff, in an action for slander, after a trial on the merits. Affirmed.

H. S. Frye, H. B. Hoyt, and R. L. Blewett, for appellant.

J. A. Rokes and F. M. Jeffery, for respondent.

PARKER, J.—This action was brought by respondent against appellant to recover damages for alleged oral defamation of character. The complaint contains two separate causes of action. The first alleges that appellant, on the 3d day of February, 1908, in the city of Seattle, in the presence and hearing of several persons, spoke in a loud tone of voice the following words to respondent: "Don't speak to me, you son-of-a-bitch. When you left Cripple Creek, you left your wife on her deathbed and came West with a whore." The second alleges that on the same day in the city of Seattle in the presence and hearing of several persons, appellant

¹Reported in 106 Pac. 129.

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spoke and used the following words of and concerning respondent: "Do you know the history of this man Jeffery, whom you are working for? He left his wife on her deathbed and came West with a whore." Appellant answered, admitting the speaking of the words, but denied they were slanderous, and as an affirmative defense, alleged that the words so spoken were true. Respondent replied, denying the truth of the words so spoken. A trial resulted in a verdict and judgment against appellant, from which he has appealed to this court.

Counsel for appellant assign error upon the denial of the motions for nonsuit, and for judgment notwithstanding the verdict, and argue that the trial court should have decided, as a matter of law, that the words spoken by appellant of and concerning respondent did not impute to him a criminal offense involving moral turpitude; to wit, the offense of living in a state of adultery. The learned trial judge being of the opinion that the words spoken were capable of being construed as an imputation of such offense, though they might also be capable of a different construction, submitted to the jury the question of whether or not they did impute to respondent such a crime. It seems clear to us that the words here admitted to have been used, were readily susceptible of the defamatory meaning claimed for them by respondent, hence it was not error as against appellant for the trial court to submit the determination of that question to the jury. Newell, Slander and Libel (2d ed.), 290; 18 Am. & Eng. Ency. Law (2d ed.), 991; 25 Cyc. 543.

The instructions requested by counsel for appellant, defining the offense of living in adultery, were embodied, in substance, in those given by the court to the jury. We conclude the judgment should be affirmed; it is so ordered.

RUDKIN, C. J., DUNBAR, CROW, and MOUNT, JJ., concur.

[No. 8127. Department Two. January 8, 1910.]

WILLIAM G. JONES *et al.*, Respondents, v. BERT R. WILLIAMS, Appellant.¹

ADJOINING LAND OWNERS—BUILDING RESTRICTIONS—CONSTRUCTION—DEEDS—CONDITIONS. The erection of a garage and storeroom on the street line of a lot is not a violation of a building restriction forbidding the erection of a "flat building or tenement house on said premises" or "any residence or other dwelling house nearer to the street line" than certain specified dwellings on adjoining property; such restrictions being construed strictly against the grantor and not extended beyond the clear meaning of the words used.

ADJOINING LAND OWNERS—MALICIOUS STRUCTURES—INJUNCTION—STATUTES—CONSTRUCTION. Bal. Code, § 5433, authorizing an injunction to restrain the malicious erection of any structure intended to spite, injure or annoy an adjoining proprietor, must be strictly construed in order to avoid the violation of property rights, and therefore does not apply to a building described in the complaint as a "public garage plant" which evidently enhances the value and enjoyment of the land and is not a nuisance, regardless of the motives of the owner and his intent to annoy his neighbor.

Appeal from a judgment of the superior court for King county, Morris, J., entered January 9, 1909, in favor of the plaintiff, upon overruling demurrers to the complaint, in an action to enjoin the erection of a garage upon certain premises. Reversed.

Howard Waterman, for appellant.

Chauncey L. Baxter and *John R. Wilson*, for respondents.

PARKER, J.—This cause comes to this court upon the question of the sufficiency of the plaintiffs' amended complaint, as against demurrers to the two causes of action therein set forth. The demurrers were interposed by defendant upon the ground that the facts pleaded did not constitute a cause of action, and being by the court overruled, the defendant elected to stand thereon, when judgment was rendered against

¹Reported in 106 Pac. 166.

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him, as prayed for, from which he appeals to this court. The amended complaint, omitting formal parts, is as follows:

"The above named plaintiffs, for cause of action against said defendant and for an amended complaint herein, allege:

"(1) That plaintiffs are now and for some years last past have been the owners in fee and possessed of certain premises with a dwelling house thereon in the City of Seattle, county of King, and state of Washington, and more particularly described as Lot ten (10), in Block ten (10), of the Supplemental Addition to Frank Pontius' Addition to the City of Seattle.

"(2) That defendant now is and at all the times hereinafter mentioned was the owner and possessed of certain premises adjoining that of plaintiffs on the north, which said premises is particularly described at Lot eleven (11), in Block ten (10), of the Supplemental Addition to Frank Pontius' Addition to the city of Seattle, King county, Washington.

"(3) That on or about October 4th, 1906, one W. E. Starr and wife deeded said last named property to one Mary C. Finch, prior to the purchase of same by the defendant herein; that said deed from said Starr and wife to said Finch contained the following restriction clause: 'Said second party, her heirs and assigns for the space of ten (10) years hereafter, is not to erect any flat building or tenement house on said premises, nor shall there be any residence or other dwelling house erected on said premises nearer to the street line than on a line with the two residences now on either side of said lot.' That defendant acquired said premises, with full knowledge of the existence of said restrictive clause; that said restriction clause is a covenant running with the land and it was thereby intended that no building should be erected on said premises closer to the street line than on a line with said two residences.

"(4) That defendant has applied for and received a permit to erect on said premises a garage and store room at a cost of \$700, and before the commencement of this action had laid the foundation of same; that said building when completed would extend within a few feet of the sidewalk line and would project out some fifteen or twenty feet be-

yond an imaginary line running from the front of said residence on either side of said lot.

"And for a second cause of action plaintiffs allege:

"(1) Plaintiffs hereby adopt and make a part hereof paragraphs one and two as set forth in their first cause of action.

"(2) That the defendant is proceeding to build, erect and construct a public garage plant on the south half of his said lot which is next to and adjoining plaintiff's said lot; that the representations and claims made by defendant that said structure is to be used as a garage either public or private, is without foundation in fact; that said garage when completed will be a frail, loosely constructed frame structure 27 feet wide and about 15 feet high and about 15 feet above street level and will be supported by sills and posts of small dimensions entirely inadequate for the support of a building intended to be used as a garage; that said structure will extend nearly the entire distance east and west along the south line of defendant's lot and to within a few feet of plaintiff's residence and will entirely obstruct plaintiff's light and air on the north and is and will be a great damage to plaintiff and a hindrance and obstruction to the enjoyment of their said property; that said structure has been and is being erected and maintained by the defendant maliciously with intent to spite, injure and annoy the plaintiffs, who are adjoining property owners as aforesaid.

"(3) That by reason of the premises, plaintiffs have no full, complete and adequate remedy at law.

"Wherefore, plaintiffs pray that a mandatory injunction issue compelling the said defendant to refrain from erecting or causing to be erected a garage, or other building such as defendant is attempting to erect thereon; that a mandatory injunction issue to compel the removal of said portion of said building now erected thereon; that plaintiffs recover their costs in this action and for such other and further relief as to the court shall seem just and proper."

The only question presented in the brief of counsel upon the demurrer to the first cause of action is as to the sufficiency of the allegations thereof to show a violation or threatened violation of the building restrictions contained in the deed by which appellant holds his lot. By these re-

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strictions it will be noticed appellant, "is not to erect any *flat building or tenement house* on said premises, nor shall there be any *residence or other dwelling house* erected on said premises nearer to the street line than on a line with the two residences now on either side of said lot." Learned counsel for the respondents contend that the "garage and store room" which they allege appellant is proceeding to construct is in violation of this restriction. It is plain that the building of such a structure on the premises would not be a violation of the building restrictions in the deed unless it can be said such structure is included within the terms, "flat building," "tenement house," "residence," or "dwelling house." It also seems plain that none of these terms as ordinarily understood includes "garage" or "store room." But learned counsel for respondents contend that, "The clear intention of the parties to the original deed containing the restriction, was that there should be no building erected on said premises nearer the street line, than on a line with two residences then on either side of said lot." If this be the intention of the parties to the deed containing the restriction, it is difficult to understand why they did not make such intention plain by using some simple comprehensive term such as "no building" instead of specifically enumerating certain buildings by names, having well recognized meaning, and stopping there. The painstaking effort to particularize is very suggestive of an intent to exclude all other structures from the language of the restrictions. It seems to be well settled law that words in a deed of conveyance restricting the use of the property by the grantee are to be construed strictly against the grantor and those claiming the benefit of such restrictions, and will not be extended beyond the clear meaning of the language so used.

In the case of *Hutchinson v. Ulrich*, 145 Ill. 336, 34 N. E. 556, 21 L. R. A. 391, the court said:

"It is insisted by the complainants that the words in the deed from Hutchinson to Parrish, 'only a single dwelling,'

mean a dwelling house to be occupied by a single family. On the other hand, defendants claim that the words used in the deed mean only one dwelling house, which may be used by one family or more. The question, therefore, to be determined is one of construction, pure and simple; in other words, what the contracting parties intended by the use of the words incorporated in the deed. Where real property is conveyed in fee, restrictions in the use are not favored; but where the intention of the parties is clear in the creation of restrictions or limitations upon the use of a grantee, courts will enforce the same. But, as is said in *Eckhart v. Irons*, 128 Ill. 582: 'If there is any doubt whether the restrictions were to cease then (at the end of fifteen years), or whether they were to be permanent, the existence of the doubt is to deny the existence of the easement or privilege. All doubts must be resolved in favor of natural rights and against restrictions thereon.' In this country, real estate is an article of commerce. The uses to which it should be devoted are constantly changing as the business of the country increases, and as its new wants are developed. Hence it is contrary to the well-recognized business policy of the country to tie up real estate where the fee is conveyed with restrictions and prohibitions as to its use, and hence, in the construction of deeds containing restrictions and prohibitions as to the use of the property by a grantee, all doubts should, as a general rule, be resolved in favor of a free use of property, and against restrictions."

See, also, 13 Cyc. 687, 715; *In re Welsh*, 175 Mass. 68, 55 N. E. 1043; *American Unitarian Ass'n. v. Minot*, 185 Mass. 589, 71 N. E. 551; *James v. Irwine*, 141 Mich. 376, 104 N. W. 631; *Hays v. St. Paul Methodist Episcopal Church*, 196 Ill. 633, 63 N. E. 1040; *McMurtry v. Phillips Investment Co.*, 103 Ky. 308, 45 S. W. 96, 40 L. R. A. 489; *Carr v. Riley*, 198 Mass. 70, 84 N. E. 426.

We are of the opinion that the words of restriction here involved cannot be held to include "garage and store room," and therefore no cause for relief is stated in the first cause of action. We rest our decision upon the grounds above stated, since no others are urged, and express no opinion upon the question of the right of the respondents to main-

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tain their first cause of action simply because they are adjoining owners, which seems to be the only basis of their right to claim the benefit of the restrictions in the deed under which their neighbor holds his lot. By what other right they claim the benefit of such restrictions does not appear in this complaint.

The second cause of action is sought to be maintained under the provisions of § 5433 of Bal. Code, which is as follows:

“An injunction may be granted to restrain the malicious erection, by any owner or lessee of land, of any structure intended to spite, injure, or annoy an adjoining proprietor. And where any owner or lessee of land has maliciously erected such a structure with such intent, a mandatory injunction will lie to compel its abatement and removal.”

It is alleged that the appellant is proceeding to construct “a public garage plant” (evidently the same structure mentioned in the first cause of action), describing it briefly, but in such manner as to render it evident that the structure will in some measure enhance the value, usefulness, and enjoyment of the land. The question then is, Does this statute prohibit the erection of such a structure by the owner upon his own land when its construction is accompanied by the intent to annoy his neighbor?

In the case of *Karasek v. Peier*, 22 Wash. 419, 61 Pac. 33, 50 L. R. A. 345, this court, in an exhaustive opinion by Judge Anders, critically examined this statute with a view to determining its constitutionality, and in doing so it became necessary to construe its language with a view of determining whether or not it violated property rights guaranteed by the constitution, and while it was there held to be constitutional, the strict construction of its terms was all that saved it from that attack. On page 428 the court said:

“If it was the intention of the legislature to prohibit the erection of such structures, we are clearly of the opinion

that the statute is, to that extent at least, unconstitutional, for the reason that to prohibit such a use of real estate would, in effect, deprive the owner of his property without due process of law and compensation. But, inasmuch as it must have been well known to the legislature that useful and valuable structures, such as houses, are rarely or never erected merely to annoy or injure an adjoining owner, we feel justified in holding that it was not the intention to prohibit the erection of such structures as really enhance the value, usefulness, or enjoyment of land, but such only as are primarily or solely intended to injure or annoy an adjoining owner, and which serve no really useful and reasonable purposes."

When an owner is proceeding to construct a building upon his land which in some measure enhances the value, usefulness, and enjoyment of the land, and the same is not a nuisance, as the allegations of this complaint fairly construed show, his motives cannot be assigned as a legal reason for preventing such construction. 29 Cyc. 1154; Joyce, Law of Nuisances, 43; 2 Wood, Nuisances (3d ed.), § 818; *Kuzniak v. Kozminski*, 107 Mich. 444, 65 N. W. 275, 61 Am. St. 344; *Falloon v. Schilling*, 29 Kan. 292, 44 Am. Rep. 642; *Lovell v. Noyes*, 69 N. H. 263, 46 Atl. 25; *Metzger v. Hochrein*, 107 Wis. 267, 83 N. W. 308, 81 Am. St. 841, 50 L. R. A. 305.

We are of the opinion that the allegations of this complaint fail to show a legal cause for the prevention, or for the removal, of the structure which it is alleged appellant is erecting upon his lot. We conclude that the overruling of the demurrers to the amended complaint, and the rendering of judgment against appellant by the learned trial court was erroneous. Its action in that regard is therefore reversed, and the cause is remanded with instructions to sustain the demurrers.

RUDKIN, C. J., MOUNT, CROW, and DUNBAR, JJ., concur.

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Syllabus.

[No. 8170. Department Two. January 8, 1910.]

L. A. THOMAS, *Appellant*, v. S. B. VAN ZANDT *et al.*,
Respondents.¹

ELECTIONS—CONTEST — NOTICE — JURISDICTION — STATUTES. Bal. Code, § 1433, requiring the issuance of a citation to defendant in an election contest to appear on a day fixed by the court, is not mandatory in the sense of requiring an order on the day the contest is filed or within any specified time thereafter, and a futile attempt to fix a day for the hearing, without the issuance of jurisdictional process, does not affect the jurisdiction of the court to fix another day and cause a citation to issue thereon.

SAME—TIME FOR GIVING NOTICE—JURISDICTION. The statute not requiring the court to give a notice and fix a date for hearing an election contest on the day the contest is filed, a delay from November 23 to December 9th in so doing does not deprive the court of jurisdiction.

SAME—DATE OF HEARING—TIME. Bal. Code, § 1433, requiring the court to fix a date for hearing an election contest, and to give a notice thereof of not less than ten nor more than twenty days from the date of the notice, does not require the fixing of a date within twenty days from the date of filing of the contest.

SAME—PROCEEDINGS—NOTICE—HEARING—TIME FOR. Under Bal. Code, § 1430 requiring an election contest to be filed within ten days after canvass of the votes, and § 1433, requiring the judge to fix a date for hearing and to give a notice thereof not less than ten nor more than twenty days from the date of the notice, the proceedings are timely and regular where the canvass was made November 23, the contest filed November 25, and the order made December 9th fixing December 22 as the date of hearing.

SAME—NOTICE OF CONTEST—BY WHOM GIVEN—CITATION. Under Bal. Code, § 1433, providing that the judge may give notice and order a session of the court on a day fixed for the hearing of an election contest, and § 1434, providing that the clerk shall also at the time issue a citation to the defendant to appear at the time and place specified in said notice, and providing the manner of service of the citation, the judge may cause notice to be given by the issuance of the citation.

APPEAL—REVIEW—MOOT QUESTIONS—ELECTIONS—CONTEST. The question of the jurisdiction of the trial court to hear and determine an election contest does not become a "moot" question by reason of

¹Reported in 106 Pac. 141.

the fact of the expiration of the six months after which certain officers are required to burn the ballots which are assumed to constitute the evidence to determine the contest; as the supreme court cannot, in advance of the trial of the contest, consider the existence of the evidence by which plaintiff intends to support his case.

Appeal from a judgment of the superior court for Whatcom county, Kellogg, J., entered December 22, 1908, dismissing a contest of the election of a county sheriff, for want of jurisdiction. Reversed.

N. K. Staley and H. M. White, for appellant.

T. D. J. Healy, Newman & Howard, and Noethe & Thompson, for respondents.

PARKER, J.—This is an election contest, commenced and sought to be prosecuted in the superior court under §§ 1425-1441, of Ballinger's Code. The questions involved in this appeal relate to the manner of acquiring jurisdiction of the parties by the court. It will be conducive to a ready understanding of the controversy, to have before us the provisions of the law involved, which are as follows:

"Sec. 1430. When any such elector shall choose to contest the right of any person declared duly elected to such office, he shall, within ten days after such person shall have been declared elected to such office, file with the clerk of the superior court of the county a written statement setting forth specifically,— . . .

"Sec. 1433. Upon such statement being filed, it shall be the duty of the clerk to inform the judge of the superior court, who may give notice, and order a session of said court to be held at the usual place of holding said court, on some day to be named by him, not less than ten nor more than twenty days from the date of such notice, to hear and determine such contested election: Provided, If no session be called for the purpose, such contest shall be determined at the first regular session of said court after such statement is filed.

"Sec. 1434. The clerk of said court shall also at the time issue a citation for the person whose right to the office is contested, to appear at the time and place specified in said

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notice, which citation shall be delivered to the sheriff or constable, and be served upon the party in person; or if he cannot be found, by leaving a copy thereof at the house where he last resided."

At the general election held on November 3, 1908, the appellant, L. A. Thomas, and respondent S. B. Van Zandt were opposing candidates for the office of sheriff of Whatcom county, and upon the completion of the canvass of the returns thereof, on November 23, 1908, the canvassing board certified that respondent Van Zandt was duly elected to said office. On November 25, 1908, the appellant filed in the office of the clerk of the superior court for Whatcom county his statement, contesting the election of respondent Van Zandt to said office. Thereafter, on the same day, upon motion of appellant's attorneys, the judge of the superior court entered an order in the cause, which, omitting recitals, is as follows:

"It is now therefore, ordered, adjudged and decreed by the court, that the said S. B. Van Zandt, defendant and contestee, and the said J. A. Miller, as county auditor of Whatcom county, state of Washington, and ex-officio clerk of the board of county commissioners of Whatcom county, state of Washington, defendant, appear before this court on the 9th day of December, 1908, at 9:30 o'clock a. m. then and there to show cause, if any they have, why they should not be required to submit themselves to the jurisdiction of this court, and abide by the further orders of this court to be made herein,"

and directed duly certified copies thereof to be served upon the respondents, which was done accordingly. On December 9, 1908, the return day of the order, there having been no other notice and no citation issued or served upon respondent Van Zandt, he appeared specially, and averred that the court had no jurisdiction of the defendant, and objected to the court entertaining jurisdiction of the matter in controversy, upon the ground that no citation had ever been issued or served in the cause as required by law. On the same day, upon the hearing of the objection, the court set

aside the order to show cause and the service thereof for the reason the same gave no jurisdiction, to which appellant excepted. Thereafter, on the same day, the court, upon motion of appellant's attorney, entered an order to the effect that the cause be set for hearing on December 22, 1908, in said court, and that notice thereof be given respondents by a citation issued by the clerk, commanding each of them to appear at said time and place and defend the action, which citation was issued and served accordingly. On December 22, 1908, the return day fixed by the order, the respondent Van Zandt again appeared specially and averred that the court had no jurisdiction, and objected to the court entertaining jurisdiction of the person of the respondent or the subject-matter of the controversy, upon several enumerated grounds which relate to the alleged failure of respondents and the court to follow the requirements of the law as to the time of taking certain steps in the cause, which we will notice hereafter. On the same day, upon hearing of the objections to its jurisdiction, the court entered its order as follows: "The court being of the opinion that it has no jurisdiction of the contestee herein, it is ordered that this proceeding be dismissed;" to which appellant excepted, and has appealed therefrom to this court.

Appellant's assignments of error are, in substance, that the learned trial court erred in sustaining the respondents' objections to the court entertaining jurisdiction of the cause upon the return of the citation on December 22d. We do not deem it necessary to review each step in the proceedings, shown by the record, affecting the jurisdiction of the trial court, other than the alleged irregularities relied upon by respondents. It is enough to say, that we find no want of any jurisdictional step in the proceedings, unless it be such as are pointed out by learned counsel for respondents in their answering brief, which covers, in substance, the same grounds of objection to the court's jurisdiction as were presented by them to the trial court and upon which the court

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based its action. We will therefore notice these matters only.

It is contended by the learned counsel for respondents, in effect, that since the trial court, by its order to show cause of November 25, set the cause for hearing on December 9, which to that extent was valid, and no legal process was issued or served, returnable on that day, to bring the respondents into court, therefore the court exhausted its power to thereafter acquire jurisdiction to try the cause. This contention is based upon the assumption that the statute is, in effect, mandatory in requiring the court to enter such order on the day of filing the contest, finally fixing the day of the hearing, and when once made such an order cannot be changed or superseded by another order fixing another return day. We are quite unable to agree with this construction of the law. We find nothing in § 1483, which can be construed as rendering it mandatory that the order fixing the return day shall be made upon the day of filing the contest, or within any specified time thereafter; and, clearly, if such order made upon that day should for any cause prove futile, that fact could not take away or lessen the power of the court to make an effective order at a later time fixing another return day. The validity of such an order, and its effectiveness in fixing a lawful return day, must be tested by the statute independent of whatever prior efforts have been made to acquire jurisdiction in the cause. We therefore conclude that the first attempt at acquiring jurisdiction by the order to show cause is wholly foreign to the question of the court's jurisdiction under the order of December 9, and the citation issued and served in pursuance thereof returnable December 22d. We need not enter into the question of the sufficiency of the first order to show cause, and the service thereof, to give the court jurisdiction. Even if it were sufficient for that purpose, when the court set it aside the result was no different than upon

the quashing of any process and the service thereof. Whether such action of the court be erroneous or not, it does not dismiss the cause or lessen the right of the plaintiff or the power of the court as to the issuance and service of another process returnable upon another day.

This brings us to the question of the sufficiency of the order of December 9, and the issuance and service of the citation thereunder, to give the trial court jurisdiction; and the substance of the contention of learned counsel for respondents upon this question is that the statute was not complied with in certain particulars, which may be summarized as follows: First, in that the return day (December 22d) of the citation issued under the order of December 9, was more than twenty days after the order to show cause of November 25, fixing the hearing on December 9; second, in that the order of December 9, fixing the day of hearing, and the issuance of the citation in pursuance thereof was not timely, it being after the day of filing the contest, and third, in that the time fixed for the hearing of the cause was more than twenty days after the filing of the contest. The first of these contentions has already been disposed of in our holding that the validity of the order of December 9, fixing a new return day and the issuance of citation in pursuance thereof, is not to be determined by the previous order to show cause, wherein an earlier return day was named. As to the second of these contentions, we have already pointed out that we find nothing in § 1433 making it mandatory that the order fixing the return day shall be entered on the day of filing the contest, failing in which the court is deprived of power to acquire jurisdiction.

Learned counsel have cited and reviewed many authorities in support of the general rule that statutes governing election contests are to be followed strictly, and all required steps, especially jurisdictional steps, must be taken within the time fixed by the statute. The doctrine sought to be in-

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voked and supported by counsels' citations is that stated in McCrary on Elections (4th ed.), § 427, as follows:

"A statutory provision requiring notice of contest to be given within a given time from the date of the official count, or from the declaration of the result, or the issuing of the certificate of election or the like, is peremptory, and the time cannot be enlarged. . . . And it may be added that there is the strongest reason for enforcing this rule most rigidly in cases of contested election, because promptness in commencing and prosecuting the proceedings is of the utmost importance, to the end that a decision may be reached before the term has wholly or in great part expired."

No doubt the spirit of this law dictates that contests instituted thereunder shall be promptly heard and determined; but there being no mandatory provision therein requiring the order fixing the return day to be made upon the day of filing the contest, it cannot be said that the court is thereafter without power to acquire jurisdiction, by the making of such an order. We are of the opinion that the court had jurisdiction to make the order of December 9, fixing a time for hearing the cause. Was the fact that the return day was fixed at a date more than twenty days after the filing of the contest fatal to the court's jurisdiction? We have seen that the order fixing such day need not be made upon the day of filing the contest, and it is clear by the terms of § 1433, that the return day may be "not less than ten nor more than twenty days from the date of the notice." Assuming that the date of the notice must be the same as the date of the order—it of course could not be before—then this return day was within twenty days from the making of the order, and in that respect complied literally with the statute.

Let us now look to the spirit of this law, and view it in its narrowest possible sense, and assume that it was intended that in no event should the hearing be fixed at a later date than the expiration of the ten days for filing the contest and the twenty days for notice of hearing, making thirty days in all. The canvass of the election returns having been

completed and certified on November 23, when the time commenced to run, it at once becomes plain that the return day, December 22, would be within the limit assumed by such a narrow construction of the law. These observations are of but little moment from a legal standpoint, but they show that, in acquiring jurisdiction to hear the cause by the superior court, the compliance with the law was clearly within its spirit as well as its letter.

The words "Judge of the superior court, who may give notice," in § 1433, when read literally and alone, might seem to mean that the notice is to be given by the judge. But in view of the evident purpose of the statute to have the notice given by citation issued by the clerk, it is evidently intended that the judge may *cause* notice to be given. This construction renders the law harmonious as to the manner of giving notice.

It is finally contended by respondents' counsel that the issues between the parties to this action, at this time, present only moot questions; and for that reason this court should decline to consider the questions presented upon this appeal, and dismiss the same. The only grounds which learned counsel assign in support of this contention is that the six months in which the election ballots are required to be preserved by the county auditor under § 1404 of Bal. Code, having expired, "at the end of which time it shall be the duty of said county auditor to burn said ballots in presence of two other officers," the evidence material to a determination of the controversy is now legally nonexistent. We do not think we are called upon at this time to determine the question of the existence of the evidence, either in whole or in part, which may be necessary to a determination of the rights of the respective parties to this cause upon a trial thereof, for the reason we do not regard such question as being relevant to the inquiry as to whether or not this case now presents only moot questions. In the case of *Adams v. Union R. Co.*, 21 R. I. 134, 42 Atl. 515, 44 L. R. A. 273, 276,

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the court said: "A moot case is one which seeks to determine an abstract question, which does not rest upon existing facts or rights." Our attention has not been called to any authority, which indicates that it is the duty, or even the privilege, of a court to inquire as to the existence of evidence to support the plaintiff's case, as a test of the question of the case, being only a moot case and therefore one the court will decline to hear. There is no suggestion here that this is not a real controversy over existing concrete rights. The term of the office in question has not expired, the parties here contending for that office are still alive, and by virtue of this appeal the cause is still pending and undetermined. As to whether or not the appellant will, upon a trial, be able to prove the necessary facts to yield him success, we will not now inquire.

We are of the opinion that the order of the learned trial court declining to assume jurisdiction and dismissing the cause upon the return of the citation was erroneous, and that the cause should be reversed and remanded for further proceedings not inconsistent with this opinion. It is so ordered.

RUDKIN, C. J., MOUNT, DUNBAR, and CROW, JJ., concur.

[No. 8258. Department Two. January 8, 1910.]

H. M. RAMEY, JUNIOR, *Respondent*, v. L. C. SMITH *et al.*,
Appellants.¹

APPEAL—REVIEW—OBJECTIONS NOT URGED BELOW. Upon appeal from an order refusing to vacate a judgment, the supreme court will consider only the points raised in the court below.

JUDGMENTS—DEFAULTS—VACATION—EXCUSABLE NEGLECT. It is not an abuse of discretion to deny a motion to vacate a default judgment on the ground of excusable neglect, where the only excuse was a business trip of the defendant's attorney taking him outside the state, the attorney having had thirteen days in which to prepare a demurrer to a complaint which he claimed failed to state a cause of action, and the answer prepared containing nothing but denials and admissions, and no excuse being offered for not appearing within the thirteen days.

SALES—CONDITIONAL SALES—WAIVER OF CONDITION—PASSING OF TITLE. Where the vendor in a conditional sale of a piano, after payments are made, elects to declare the whole sum due and recovers personal judgment against the vendees for the balance unpaid, the vendor waives his interest in the piano and the title vests in the vendees; and an allegation of a sale thereafter by the vendees to another, for value, sufficiently shows title in such other.

PLEADINGS—WAIVER OF OBJECTIONS—AIDED BY JUDGMENT—DEFAULTS. Technical objections to a complaint that might have been taken by demurrer or motion are waived by default in appearance, and the complaint will be liberally construed after judgment, although the judgment was by default.

Appeal from an order of the superior court for King county, Ronald, J., entered April 13, 1909, refusing to vacate a judgment. Affirmed.

Herbert E. Snook and Hastings & Stedman, for appellants.

Higgins, Hall & Halverstadt and Kerr & McCord, for respondent.

¹Reported in 106 Pac. 160.

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PARKER, J.—This is an appeal from an order denying a motion of defendants to set aside and vacate a default and judgment rendered thereon against them in this cause.

This action was commenced in the superior court for King county on March 20, 1909, by personal service upon the defendants within the state. On April 13, 1909, the defendants having failed to appear, they were each adjudged to be in default, and judgment was entered against them accordingly as prayed for. On April 20, 1909, the defendants filed a motion to vacate and set aside the default and judgment, which motion was supported by an affidavit of one of their attorneys as follows:

“That he is the attorney for the above-named defendants; that the above entitled action was commenced on the 20th day of March, 1909, and that on the same day a copy of said summons and complaint was served upon L. C. Smith, former sheriff of County of King and State of Washington; that on the 20th day of March, aforesaid, said L. C. Smith called at the office of affiant and delivered said papers in person; thereafter, to wit, on the second day of April, affiant made a trip to Southern Oregon to the town of Grant’s Pass, Josephine County, upon a matter of business; that at the time of departure affiant had carefully calculated that he would not be absent to exceed six (6) days, and upon arrival at Grant’s Pass it appeared to affiant that he would not be detained there longer than as originally contemplated, but to the surprise, as well as the disappointment of affiant, it became necessary to remain there a few days longer, and that the total period of affiant’s absence from the city was two (2) weeks; that upon affiant’s return to the City of Seattle, he was informed that a default had been entered against his clients for failure to answer; that by reason of the foregoing facts it was impossible for defendants to have entered their appearance or file an answer within the time prescribed by law; and that affiant has not, in any other particular, been dilatory or negligent in entering his appearance in this case; that when affiant understood that such default had been taken against his clients, he communicated with Mr. Ramey, the plaintiff above named, stating all the facts as aforesaid, and re-

quested him, as a common courtesy, to stipulate for the vacation of said default, and to permit affiant to file an answer, which request was refused; that defendants have a good and meritorious defense of said action, and they deny each and every allegation contained in the complaint affecting either of the defendants; and that on the face of the complaint it does not state facts sufficient to constitute a cause of action."

The only grounds stated in the record for the vacation of the judgment are: (1) "Excusable neglect which ordinary prudence and diligence could not have prevented," which is stated in the motion; and (2) that "the complaint does not state facts sufficient to constitute a cause of action," which is stated in the affidavit. Other grounds are argued in appellants' brief, but we are not called upon to deal with any grounds urged save those which the record shows were presented to the trial court, being the two above mentioned.

It will be noticed that the only excuse furnished for neglect of appellants to appear in the cause was that their attorney had business which took him out of the state on April 2d, which was thirteen days after he received from his clients, the appellants, the summons and complaint which had been served upon them and received by him March 20th. It is not pretended that there was any excuse for failure to appear and plead within these thirteen days. If counsel in good faith believed the complaint did not state a cause of action, the matter of demurring thereto would have been the work of only a few moments, and in view of the fact that the answer, which is tendered with the motion to vacate, contains nothing but denials and admissions of the allegations of the complaint, the labor of its preparation was also evidently very small. We are quite unable to see how it can be reasonably claimed that the learned superior court abused his discretion in refusing to vacate the default judgment on account of excusable neglect. Indeed, it could be much more reasonably contended that it would have been an abuse of discretion to have decided otherwise. *Sanborn*

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v. Centralia Furniture Mfg. Co., 5 Wash. 150, 81 Pac. 466.

The other contentions of the appellant relate to the sufficiency of the complaint to sustain the judgment. The substance of the allegations of the complaint, so far as necessary to be noticed, are that at all times mentioned defendant Smith was the sheriff of King county, and the defendant American Bonding Company was surety upon his official bond; that in April, 1907, one Trumbell and wife entered into a contract of conditional sale of a piano to them by Kohler & Chase, a corporation, for which they were to pay \$275 in installments, agreeing that "if any payment is not paid when due . . . Kohler & Chase, their agents or assigns, shall have the right, at their option, to force the payment of the total amount due or enter and take possession of said property . . . and retain all that has been paid;" that after payment by the Trumbells of several installments, and failure to pay others when due, Kohler & Chase elected to declare the whole of the balance of the purchase price due, and brought an action in the superior court of King county against the Trumbells, alleging and setting up its election to declare the whole of the purchase price due, and prayed for judgment against the Trumbells therefor; that thereafter, in February, 1908, there was rendered in said action, at the instance of Kohler & Chase, a personal judgment against the Trumbells for the whole of the unpaid balance of the purchase price of the piano; that in March, 1908, the respondent, for valuable consideration, became the owner of the piano, by transfer from the Trumbells, a formal bill of sale being executed by the Trumbells in consummation thereof on May 8, 1908; that thereafter, in May, 1908, under an execution issued upon said judgment at the instance of Kohler & Chase, the appellant Smith as sheriff seized and took into his possession said piano, after he had been notified and fully informed of respondent's ownership thereof, and also after Kohler & Chase had been so notified; that respondent demanded the return of the piano, but return there-

of was refused. It also appears by the complaint that the piano was in the possession of Mrs. Trumbell when seized by the sheriff. Judgment was prayed for, and upon default of appellants, was rendered against them as above stated.

The principal contention made against the sufficiency of this complaint to support the judgment is that it does not show that respondent was, at the time of seizure of the piano by the sheriff, the owner thereof instead of the Trumbells, against whom the execution ran. It seems to us, however, that the allegations of the complaint showing that Kohler & Chase had elected to sue for the entire balance of the purchase price, and to have a personal judgment entered against the Trumbells therefor without reference to its right of forfeiture showed they waived their right of property in the piano, and that it thereby became the property of the Trumbells and no more subject to the debt evidenced by the judgment than any other property they may have had; and the further allegation of the transfer of the title of the piano from the Trumbells to respondent by bill of sale for valuable consideration before seizure thereof by the sheriff showed title in the respondent instead of the Trumbells at the time of the seizure; and the seizure being made with knowledge of these facts on the part of the sheriff, if was of course wrongful, for which he and the surety upon his official bond would be liable in damages to the owner.

Other objections are urged against this complaint, but they are only such matters as were waived by the appellants suffering the default and judgment to be rendered against them. We are not now concerned with questions of technical defects as to form or otherwise in this complaint, whatever there may be, of that nature which appellants could have successfully challenged by motion or demurrer, had they appeared in the action and so attacked the complaint at the proper time. This being an attack upon the sufficiency of the complaint after final judgment it will be liberally construed, and all reasonable intendments will be taken

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in its favor to support the judgment. Of course the judgment must be within the scope of the allegations and prayer of the complaint which this judgment clearly is. Touching the liberal rule of construction of pleadings after judgment, the following decisions of this court are applicable: *King v. Ilwaco R. & Nav. Co.*, 1 Wash. 127, 23 Pac. 924; *Montesano v. Blair*, 12 Wash. 188, 40 Pac. 731; *Mosher v. Bruhn*, 15 Wash. 332, 46 Pac. 397; *Bishop v. Averill*, 17 Wash. 209, 49 Pac. 237, 50 Pac. 1024; *Hall v. Woolery*, 20 Wash. 440, 55 Pac. 562; *Carey v. Hays*, 41 Wash. 580, 84 Pac. 581.

This rule of construction has no less force when applied to default judgments than to others. A party suffering a default judgment to go against him without excuse waives technical defects in the complaint upon which such judgment is based, as when he appears in a cause and waives such defects by proceeding without objecting thereto in the orderly manner provided by rules of procedure. We are of the opinion that the learned trial court should be affirmed in its disposition of the cause. It is so ordered.

RUDKIN, C. J., MOUNT, CROW, and DUNBAR, JJ., concur.

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[No. 8349. Department Two. January 8, 1910.]

PATRICK PHILBIN, *Respondent*, v. COLUMBIA & PUGET SOUND
RAILROAD COMPANY, *Appellant*.¹

MASTER AND SERVANT—NEGLIGENCE OF MASTER—DEFECTIVE APPLIANCE—EVIDENCE—SUFFICIENCY. There is sufficient evidence of negligence in the use of a pneumatic rivet hammer used in structural iron work without a wire attached to the rivet set to prevent the set from being thrown from the hammer when the air was accidentally applied while the hammer was not in place, where it appears that the same was an effective safety device, in common use, easily attached without lessening the effectiveness of the hammer, and would have prevented the accident.

SAME—ASSUMPTION OF RISKS—CONTRIBUTORY NEGLIGENCE—INEXPERIENCED EMPLOYEES. Whether an apprentice and helper assumed the risk in assisting a foreman who was working with a pneumatic rivet hammer without a wire attached to the rivet set as a safety appliance in case of accidental application of the air, or was guilty of contributory negligence, is for the jury, where it appears that he was twenty years of age, had never worked with a pneumatic hammer before, and did not know that the wire should be used.

Appeal from a judgment of the superior court for King county, Tallman, J., entered March 27, 1909, upon the verdict of a jury rendered in favor of the plaintiff, for personal injuries sustained by an apprentice in a machine shop through a defective appliance. Affirmed.

Farrell, Kane & Stratton and *Peter L. Pratt*, for appellant.

Thomas J. Casey and *Solon T. Williams*, for respondent.

PARKER, J.—This is an action brought by the plaintiff to recover damages for personal injuries which he alleges resulted to him from the negligence of the defendant. A trial before the court and a jury resulted in a verdict and judgment against defendant, from which it has appealed.

The principal question presented arises upon the suffi-

¹Reported in 106 Pac. 169.

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ciency of the evidence to sustain the verdict touching the negligence of the defendant in using a defective pneumatic riveting hammer. The plaintiff, at the time of the injury he complains of, was employed by defendant as an apprentice and helper in the construction of a freight conveyor, and was, by direction of defendant's foreman over him, engaged in holding an iron bar against the end of a rivet for the purpose of riveting together iron plates forming a part of the conveyor, while the foreman was operating a pneumatic hammer upon the rivet. While so engaged, the pneumatic hammer was permitted to be removed from off the rivet and away from the iron plate and pointed at the defendant while it was in operation; that is, while the air was being applied thereto, and the rivet set was thereby forced out of the pneumatic hammer and was thrown with great violence and struck plaintiff in the face, causing the injury, the nature and extent of which it is not necessary for us to notice.

The principal ground of negligence relied upon by plaintiff to show the liability of defendant is that the pneumatic hammer was defective and unsafe, in that it did not have any wire attachment to the rivet set, to keep it from being violently thrown out of and away from the hammer, when the air happens to be applied and it is not being held against a rivet or solid surface, which wire attachment plaintiff contends is necessary to the reasonable safe use of the hammer. Motions for nonsuit and for a directed verdict made by defendant's attorney at the close of plaintiff's evidence, and also at the close of all the evidence, being denied, the defendant appeals. The error assigned upon the court's disposition of these motions involves only the sufficiency of the evidence, showing defendant's negligence in its failure to have the wire attachment on the hammer, to sustain the verdict.

The evidence conclusively shows that there was no wire attachment upon the pneumatic hammer attached to the rivet set to prevent it being thrown from the hammer with con-

siderable force by the air, in the event the air should be applied when the hammer is not firmly pressed against a rivet or a solid surface. The air is applied by the operation of the hammer by a trigger, used somewhat as on a gun. The air is by this means applied when the hammer is pressed upon the rivet, and while so held and in operation it seems apparently safe. It is when the air is applied and the hammer set in motion without being held against a rivet or solid surface that the danger arises. This results in the ejection of the rivet set, a small piece of iron, much as a bullet is ejected from a gun.

It is claimed by respondent that a wire attached to the rivet set in such manner as is common in the use of the hammer by structural iron workers is a safety device, and will arrest the flight of the rivet set, at or very near the end of the hammer and thus prevent it being thrown, as it otherwise would be, with sufficient force to injure a person, as it did injure him in this instance. Appellant claims that the wire attachment is used only in riveting structural iron work where it is being carried on at some distance above ground, or on bridge work, and is simply a device to save time and prevent the necessity of descending to recover the rivet set, when accidentally ejected; that it is not a safety device, and is of no practical use for safety purposes, or as a protection to the person holding the bar against the rivet for the application of the hammer by the operator.

The evidence is somewhat in conflict upon these questions, but there was competent evidence tending to show, that the wire attachment was quite an effective safety device, especially in insuring the safety of the person holding the bar against the rivet, and is in common use in connection with the pneumatic hammer in structural iron work; that this was structural iron work, though not being carried on at a distance above the ground; that the wire attachment is of easy application and does not appreciably lessen the effectiveness of the hammer or interfere with its use; that when

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properly applied it will arrest the flight of the rivet set very near the hammer, and cause it to drop and hang by the wire when accidentally ejected; that, if the rivet set of the hammer in use by appellant had been secured by such an attachment, respondent would not have been injured. No useful purpose would be served for us to review this evidence in detail here. We deem it sufficient to say that, from a careful reading of all the evidence, we are of the opinion that it was sufficient to support the conclusion that appellant was negligent in using this hammer without the wire attachment, and that respondent's injury was the result of such negligence.

Learned counsel for appellant also contend that the risk was assumed by respondent. The evidence shows that respondent was twenty years old and had considerable experience in iron work; he was, however, but little acquainted with the pneumatic hammer. He testified that he "did not know it (the wire) should be used," and never worked with any other pneumatic hammer than this one. We think this, like appellant's negligence, was a question of fact for the jury.

The contributory negligence of respondent is also urged as a defense. Upon this question the evidence is very meager and also conflicting. It was clearly not such as to enable us to say, as a matter of law, that appellant was relieved of liability by reason of respondent's contributory negligence.

Other alleged errors relate only to matters within the court's discretion occurring during the trial, and do not appear to us to have been prejudicial to appellant's rights. They are called to our notice only by being claimed as prejudicial without argument or citation of authorities, hence we do not feel called upon to discuss them. We find no error in the record, and therefore affirm the judgment.

RUDKIN, C. J., DUNBAR, CROW, and MOUNT, JJ., concur.

[No. 8388. Department Two. January 8, 1910.]

ELZA DEAN *et al.*, Respondents, v. WILLIAM B. WILLIAMS *et al.*, Appellants.¹

FRAUDS, STATUTE OF—BROKERS' COMMISSIONS—STATUTES—RETROACTIVE EFFECT. LAWS 1905, p. 110, requiring contracts for the payment of a broker's commission on the sale of real estate is not retroactive and has no application to contracts made prior to its enactment.

BROKERS—COMMISSIONS—CONTRACTS—PERFORMANCE—DEFENSES — FAILURE OF TITLE. Brokers are entitled to their agreed commissions as a matter of law, where they procured a binding contract with a purchaser, able and willing to complete the deal, which failed for defects in the title unknown to the brokers, although there was testimony to the effect that the commission was to be paid only out of the last payment and that the same was not to be paid if the sale was not consummated; since the agreement did not contemplate the failure of the sale by reason of the fault of the grantors.

VENDOR AND PURCHASER—CONTRACTS—TITLE—MARKETABLE TITLE. A contract to sell land with a perfect title satisfactory to the purchaser only requires the furnishing of a good marketable title, and does not give the purchaser an arbitrary right to defeat the sale.

Appeal from a judgment of the superior court for Yakima county, Kauffman, J., entered June 20, 1908, upon the verdict of a jury rendered in favor of the plaintiffs, by direction of the court. Affirmed.

Henry J. Snively, for appellants.

Wende & Taylor, for respondents.

PARKER, J.—The respondents brought this action in the superior court to recover commission claimed to be due them from the appellants as compensation for the finding of a purchaser for land of appellants. The questions arise upon the sufficiency of the evidence introduced by appellants to support the affirmative defenses pleaded by them. At the conclusion of the trial, the court granted respondents' motion for

¹Reported in 106 Pac. 130.

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a directed verdict, and rendered judgment accordingly, in favor of respondents and against appellants for the amount of the commission as prayed for in the complaint.

The correctness of the trial court's disposition of the cause can be determined from certain facts in the record which are either undisputed or established beyond controversy, as follows: In the fall and winter of 1904-1905, the respondents were engaged in business as partners, as real estate agents and brokers, at Sunnyside, in Yakima county; the appellants being then the owners of forty acres of land near there. In November, 1904, it was orally agreed between appellants and respondents that, if the latter would find a purchaser for the land at \$140 per acre, making \$5,600 in all, with a cash payment of \$2,000, the balance to be paid on terms satisfactory to appellants, the respondents should receive a commission of five per cent on the purchase price. In pursuance of this agreement, respondents induced R. G. Page to become interested in the purchase of the land, which resulted in appellants and Page entering into a written contract for the sale of the land on February 22, 1905, by which Page paid \$500 cash, and was to pay \$2,300 on November 1, 1905, at which time a deed was to be given and the balance of \$2,800 to be then secured by a mortgage upon the land payable on or before three years. The contract between appellants and Page for the purchase of the land was drawn up by one of the respondents in their office, and contained a provision in substance that an abstract should be furnished by appellants, showing perfect title, satisfactory to Page. It will be noticed that the sale was not consummated upon the exact terms at which it was placed in the hands of respondents, the cash payment as finally agreed upon and made being \$500 instead of \$2,000. It is claimed by appellants that, upon the making of this concession on their part, it was agreed between them and respondents that the commission was not to be paid out of the \$500, but that it was to be paid when the deal was completed on November

1, and also that no commission was to be paid if for any reason the deal should not be completed by deed and mortgage on November 1, 1905, as agreed. We will take the statements of the appellants as showing the terms of this contract, though they are to a considerable extent disputed, for the purpose of determining the right of respondents to their commission, upon the failure of the deal. Appellant W. B. Williams testified:

“Q. What was said there, if anything, further between you and Dean and Woods about the commission? A. Well, I told him I would not pay the commission until the fall payment. . . , Q. What was the agreement about that? A. Finally Mr. Woods I think mentioned about drawing an order on Mr. Page if it was satisfactory to him if I would sign it—I and my wife, and I objected to sign it because I was afraid it would come back on me. He said, ‘We will draw the order to apply on the contract and if the contract is busted it will sure let you out.’ . . . Q. Did Mr. Woods draw up this contract? A. Yes, sir. Q. What was the arrangement between you and them now as to this commission if the contract was not carried out and the payment of \$2,300 made? A. There would be no sale. If the contract is busted it will let you out. Q. Of what? A. Of paying any commission. Q. That is there was no commission if the contract was not carried out? A. That is the way I understood it. . . . Q. Did that have any effect upon you signing this contract, that is Mr. Woods’ statement that if the contract was not carried out, if it was busted that you would not have to pay any commission. A. It surely would. I did not want to pay any commission out of \$500. . . . A. He wanted to know if I would give an order. Q. Order for what? A. For the commission. I told him I would under the condition that it was not to be paid unless the deal went through. . . . Q. You had however previous to that time accepted \$500 on it, had not you? A. I had accepted 500 dollars.”

Appellant Mary B. Williams testified:

“Q. Did you ever hear the plaintiffs, or either one of them say anything in relation to the payment of the commission on this deal? A. Yes, sir. Q. Now tell the jury, and speak so that they can hear it, what you heard in that connection. A.

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They brought out that order for me to sign on Mr. Page, the \$280. Mr. Dean and Mr. Woods was not to draw any commission unless the deal went through. Q. Did they bring it out together? A. Yes, sir. Q. And Dean and Woods, they both were together in the house? A. Yes, sir. Q. What was the talk about the commission? A. He made the remark, Mr. Williams, if the deal did not go through he should not get any commission. Q. They agreed to it? A. Yes, sir."

This testimony gives a version of how the payment of the commission was to be affected by a failure of the deal as favorable to appellants' contention as can be drawn from the record. At the time of executing the contract of purchase with Page, or soon thereafter, the appellants signed and gave to respondent an order on Page for the commission, \$280, requesting Page to pay respondents that amount and charge the same to appellants on the contract price. Until after this time, respondents had no knowledge of any defect in appellants' title to the land, nor did Page have any such knowledge, all parties assuming the sale would be consummated. An abstract was furnished Page in compliance with the contract of purchase, and as admitted in appellants' answer, "said title was clouded and unsatisfactory to said Page and that said Page refused to complete said purchase and demanded and received under said contract the earnest payment of five hundred dollars." The undisputed testimony of Page is to the effect that the only reason the contract failed of performance was the imperfect title. It is also evident that Page was willing and able to perform his part of the contract if appellants would give him good title. What then was the agreement as to the effect of a possible failure of the purchase contract upon the right of respondents to their commission? Reduced to its simplest terms, the commission contract was that the commission was not to be paid unless the deal went through. This, in substance, is the principal affirmative defense. The other affirmative defense is the statute of frauds.

Referring first to the defense that this contract for payment of commission is void because not in writing, learned

counsel for appellants contend it is void under Laws of 1905, p. 110, which requires such contracts to be in writing. That law, however, was not passed until after the making of this contract, and it hardly needs citation of authority to show that such a statute is not retroactive. 20 Cyc. 281. Our attention is not called to any authority in support of counsel's contention, which seems to be, because the contract is sought to be enforced after the enactment of the statute, it is therefore required to have been in writing.

The principal contention of learned counsel for appellants, is that since there was a failure in the performance of the contract of purchase, the respondents' right to commission also failed; the argument being that the latter was wholly dependent on the former no matter what the cause of such failure was, whether it be the fault of the appellants or not. It is plain that the failure of the purchase was in no sense the result of any failure of full performance of the agency and commission agreement on the part of respondents. They fully completed their work to the last detail. They secured a purchaser ready and willing to purchase upon terms satisfactory to appellants. They did not cease their efforts in the interest of appellants until they had secured the entering into of a valid binding written contract for the purchase of the land, between Page and appellants. There was absolutely nothing more for them to do. So far as they are concerned, the sale was complete because they had carried the negotiations to that point where Page and appellants were legally bound to each other in writing. At that point their service was completed. It is also plain that the failure of the fulfilling of the contract of purchase was not by reason of any unwillingness on the part of Page to do all he was legally required to do under its terms. His refusal to accept the deed and pay the balance of purchase price in cash and by mortgage, as agreed, was solely the result of the failure of appellants to give him good title as agreed. The cause then of the failure of the consummation of the deal, was neither

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attributable to respondent, nor to Page, as to anything either was legally required to do; but was wholly the fault of appellants themselves in failing to do the things they agreed to do, to wit, convey the land and furnish good title, which respondents had a right to assume appellants could do at all times while they were endeavoring to bring about the sale, and of which they knew nothing to the contrary until after their work was completed.

The question then arises, Is this cause of the failure of the purchase such as to defeat respondents' right to their compensation? It may be that the literal terms of the commission agreement, as testified to by appellants, would seem to negative respondents' right, but such a construction would make it an agreement within the sole power of appellants to perform or not; that is, they could cause the failure of the purchase contract by any means they choose, and then say to the respondents: "The purchase not being consummated your commission is not payable, since it depends upon such consummation, notwithstanding you have fully performed the service, and secured a binding written contract for the sale, and notwithstanding the purchaser is able and willing to perform if we will give him good title." This would be in effect construing the agreement out of existence; for a contract not binding on both parties is no contract. Clearly such is not the legal result of this agreement. We think that, while the agreement contemplated the possible failure of the sale, it did not contemplate that a failure of the sale by reason of the fault of the appellants should defeat respondents' right to their compensation.

In the case of *Gauthier v. West*, 45 Minn. 192, 47 N. W. 656, it was claimed that the commission was not to be paid until the property was transferred by deed, which had not been done at the commencement of action on account of an alleged flaw in the title, to remove which an action had been commenced. The trial court in effect directed a verdict as in this case, except it left to the jury the sole question of the

amount, which was there in dispute, but which is not here. Upon a review of that case the supreme court, in affirming the trial court said:

“Conceding the contract to have been as defendant claims, the plaintiffs, having no knowledge of any defect in the title, were not obliged to wait for the amount due as their compensation until defendant’s title was perfected. The default was with him, and not with the plaintiffs, for they had fully performed by producing the ready, willing, and able purchaser. In making their contract, and in producing a customer for the property, they had acted upon the assumption, as they had a right to do, that the defendant could tender a title free from infirmity. Even if it was agreed between the parties that plaintiffs were to wait for their compensation until the sale was fully completed, there was an implied contract that the defendant had the ability and could confer upon the purchaser a perfect title to the property. *Hamlin v. Schulte*, 34 Minn. 534, 27 N. W. 301, and cases cited; *Peet v. Sherwood*, 43 Minn. 447, 45 N. W. 859, and cases cited.”

See, also, *Berg v. San Antonio St. R. Co.*, 17 Tex. Civ. App. 291, 42 S. W. 647, 43 S. W. 929; *Alvord v. Cook*, 174 Mass. 120, 54 N. E. 499; *McDermott v. Mahoney*, 139 Iowa 292, 115 N. W. 33; *Peach River Lumber Co. v. Montgomery*, (Tex. Civ. App.), 115 S. W. 87; *Parker v. Walker*, 86 Tenn. 566, 8 S. W. 391; *Yoder v. Randol*, 16 Okl. 308, 33 Pac. 537, 3 L. R. A. (N. S.) 576, and note. See note in 43 L. R. A. 609 (*Brackenridge v. Claridge & Payne*, 91 Tex. 527, 44 S. W. 819).

It is argued, in effect, by learned counsel for appellants, that since the purchase contract provided that the title should be satisfactory to Page, he had the right to avoid the contract even if the title was perfect, and hence, respondents’ right to commission must be determined as if Page had said the title was not satisfactory to him, regardless of whether it was in fact perfect or not. If Page had such an arbitrary right to avoid the purchase under the contract, since respondents had procured and knew the terms of the contract, it is

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possible their right to commission might be defeated by such an arbitrary action on the part of Page; but we do not think Page had any such arbitrary right. As we have seen, the contract was that the title should be perfect and satisfactory to Page. This we think means only that the appellants should furnish a good marketable title. As was said in *Roberts v. Kimmons*, 65 Miss. 332, 3 South. 736:

"The condition in the written contract in regard to the title being made clear and satisfactory to the purchaser, before the sale was to be concluded, was nothing more than the law and good faith implied, to wit, that the purchaser should get a title free from valid objections. *Folliard v. Wallace*, 2 Johnston 395; *Middleton v. Findla*, 25 Cal. 76. The purchaser would have been entitled to this without any such stipulation in the contract, unless it had been shown that he agreed to take the risk of the title."

See, also, *Ross v. Smiley*, 18 Colo. App. 204, 70 Pac. 766; *Moot v. Business Men's Inv. Ass'n*, 157 N. Y. 201, 52 N. E. 1, 45 L. R. A. 666. These observations, however, hardly seem necessary in view of Page's readiness, willingness and ability to consummate the sale if appellants would give him a good title as they agreed to.

Appellants' counsel cite the case of *Seattle Land Co. v. Day*, 2 Wash. 451, 27 Pac. 74, in support of his contentions. We do not regard that case in point here. There were questions of disputed fact in that case on which the jury found in favor of defendant. There are remarks on page 456 of that decision in harmony with the views expressed in this opinion, though these questions of law are not there reviewed, nor are there any citation of authorities therein.

We are of the opinion that the learned trial court correctly held that appellants failed to prove their affirmative defenses sufficient for submission to the jury, and the admitted facts as to the commission contract and the service rendered thereunder put the respondents' case beyond controversy. The judgment is affirmed.

RUDKIN, C. J., CROW, MOUNT, and DUNBAR, JJ., concur.

[No. 8214. Department Two. January 10, 1910.]

THE STATE OF WASHINGTON, *Appellant*, v. C. L. HOFFMAN
*et al., Respondents.*¹

GAMING—INFORMATION—DEFINITENESS. The felony of conducting or opening certain games of chance at a place "where persons resort for the purpose of gambling," under Laws 1903, p. 63, is not a "continuing" offense, and an information charging the crime as committed on different days between specified dates is not specific and certain as to the offense charged, and is demurrable in that it charges more than one offense (Dunbar, J., dissenting).

Appeal from a judgment of the superior court for Pacific county, Rice, J., entered June 18, 1909, dismissing a prosecution for conducting gambling at a gambling resort, upon sustaining a demurrer to the information. Affirmed.

John I. O'Phelan, for appellant.

Chas. E. Miller, for respondents.

PARKER, J.—The respondents were charged by information filed in the superior court by the prosecuting attorney as follows:

"That said C. L. Hoffman and Fred Carter, on the 5th day of April, A. D. 1909, in South Bend, Pacific county, Washington, then and there being, did then and there on said 5th day of April, A. D. 1909, and on divers and different other dates, days and times, between the first day of January, A. D. 1909, and the first day of May, A. D. 1909, then and there being, did then and there wilfully, unlawfully and feloniously conduct, carry on, open and cause to be opened, games of poker, draw poker, rounce and other banking games of chance played with cards for chips, money, checks, credits and other representatives and things of value in that certain one-story frame building in South Bend, Pacific county, Washington, known as 'Hoffman's,' the said one-story frame building known as 'Hoffman's' then and there being a place where divers persons then and there resorted for

¹Reported in 106 Pac. 139.

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the purpose of playing, dealing and operating said games of poker, draw poker, rounce and other banking games of chance with cards, contrary to the form of the statute in such cases made and provided and against the peace and dignity of the state of Washington."

The crime which it is sought to require respondents to answer for by this information is defined by chapter 51, pp. 63, 64, Laws of 1903, as follows:

"Any person who shall conduct, carry on, open, or cause to be opened, either as owner, proprietor, employee, or assistant, or in any manner whatever, whether for hire or not, any game of faro, monte, roulette, rouge et noir, lansquenet, rondo, vingt-un (or twenty-one), poker, draw-poker, brag, bluff, thaw, tan or any banking or other game played with cards, dice or any other device, or any slot machine, or other gambling device, whether the same be played or operated for money, checks, credits, or any other representative or thing of value, in any house, room, shop, or other building whatsoever, boat, booth, garden or other place, where persons resort for the purpose of playing, dealing or operating any such game, machine or device, shall be guilty of a felony, and upon conviction thereof shall be imprisoned in the penitentiary for the period of not less than one nor more than three years."

A demurrer to the information by respondents, upon the ground that more than one crime is charged therein, was sustained by the superior court, and the prosecuting attorney electing to stand thereon and declining to file a new information, the respondents were by the court ordered discharged, from which the state by the prosecuting attorney has appealed to this court.

It is elementary under our system of criminal procedure that an information must be direct and certain as to the crime charged, and that it must charge but one crime. Bal. Code, §§ 6842, 6844; *State v. Bliss*, 27 Wash. 463, 68 Pac. 87. It will be noticed that this information charges the respondents with doing the acts declared to be a crime by this law on the "5th day of April, 1909, and on divers and different other

dates, days, and times, between the 1st day of January, 1909, and the first day of May, 1909." The theory upon which the prosecuting attorney seeks to justify the charging of the offense upon these different times is that the offense is a continuing one, and consists of conducting a gambling resort. It is argued that since the place where the prohibited games are conducted, carried on, or opened, must be proven to be a place, "where persons resort for the purpose of playing, dealing, or operating any such game, machine, or device," therefore it is not only permissible but necessary to charge the crime as being committed on different days and times so as to show it is such a resort.

We are not able to agree with this view of the law. It is apparent, of course, that the law is aimed at the suppression of gambling resorts, as is indicated by its title, and also, as has heretofore been noticed by this court, in *State v. Preston*, 49 Wash. 298, 95 Pac. 82, and *State v. Gaasch*, ante p. 381, 105 Pac. 817. But the acts constituting the crime which it seeks to punish to the end that such resorts may be suppressed must be looked for in the body of the law defining the crime, where we find that it consists of the specific act of *conducting, carrying on, opening, or causing to be opened*, any of the games named in the places specified, which places for brevity's sake we may term gambling resorts, though such places are described rather than so named in the law. Of course it is necessary to charge that the prohibited acts are done at such a place, but it does not follow that the character of the place depends upon the number of different times the respondents may have committed the prohibited acts there. If respondents committed any such acts at one time at such a place, they would be guilty of the offense defined though they may never have been at the place at any other time. We are not dealing with the question of how the nature of the resort may be proven. It is at least certain that it is immaterial how often the accused committed any of the acts there so far as their guilt is concerned. It

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seems to us that the acts charged against the respondents as being committed upon these several different days and times charges the commission of as many different and separate offenses under this law.

Learned counsel for the state has, with marked industry, collected and cited a great array of authorities in support of his contention, based upon the assumption, however, that the statute defines and that he has charged a continuing offense. If such were the offense defined and charged, instead of the doing of certain acts in a gambling resort, the authorities cited would justify charging the keeping of the resort covering a period of several days or more, and treating it as one offense.

The offense which is, by this information, charged against respondents being a felony, punishable by imprisonment in the penitentiary, they are entitled to the protection of the same rules of criminal pleading requiring certainty and singleness of the offense charged as if they were being called upon to answer any other felonious charge. We are of the opinion that this information does not inform them of the crime which they are called upon to answer with that degree of certainty and singleness which the law requires. The order of the learned superior court sustaining the demurrer to the information is affirmed.

RUDKIN, C. J., MOUNT, and CROW, JJ., concur.

DUNBAR, J. (dissenting)—I dissent. While it is true that, by express mandate of the statute, an information must be direct and certain as to the crime charged and that it must charge but one crime, this information, in my judgment, is in no way obnoxious to this requirement. It is as direct and certain as to the crime charged as the statute itself is, for it is in the language of the statute. It charges but one crime, and that is the crime of conducting a gambling resort. If it charged the defendants with gambling and also with keeping a gambling resort, there would be some merit in the conten-

tion that it was duplicitous and did not notify the defendants of what crime they were charged with, to the end that they might intelligently prepare their defense. This is all they are entitled to, as is shown by construing the statute quoted in connection with § 6850 [Ballinger's Code] to the effect that the indictment or information is sufficient if it can be understood therefrom (so far as this question is concerned) that the act or omission charged as a crime is clearly and distinctly set forth, in ordinary and concise language, without repetition, and in such a manner as to enable a person of common understanding to know what is intended. If the same force and effect were given to this provision of the statute which reaches to the merits of the case, as is given to the more technical requirements of § 6844, or if that section were construed in connection with the salutary provisions of § 6850, the defendants would be protected in all their rights, while at the same time the intention of the law would prevail and malefactors would not so often go unwhipped of justice.

The respondents cite several cases to sustain the doctrine that a defendant cannot be charged in one and the same count with two or more independent offenses, and this is no doubt the established rule, especially where the penalties for the different crimes are different. But this rule has no application to the case at bar, in so far, at least, as the contention is concerned, which I understand is the basis of the decision, viz., that this information charges the defendants with committing the crime of maintaining a gambling resort at different times; for the crime charged is exactly the same on one date as another, and the penalty is the same. When a statute enumerates several acts in the alternative, the doing of which is subjected to the same punishment, all of such acts may be charged cumulatively as one offense. 10 Ency. Plead. & Prac., p. 536. This announcement is well sustained by authority. In *United States v. Scott*, 74 Fed. 218, the indictment charged a series of acts, all of the same character and punishable by the same penalty, and the indictment was sus-

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tained by Judge Taft, who cited, approvingly, *Reg. v. Bleasdale*, 2 Car. & K. 765, where it was held that, where a man for several years had been stealing coal by an entry run by him into the seams of coal belonging to forty other coal mine owners, he might be indicted on one count for all the thefts in his continuous series of coal mining.

It cannot be that the defendants are entitled to anything more than justice, or in other words a fair trial. That is the ultimate object of all laws governing criminal procedure, and ought to be borne in mind in the construction of criminal laws. The defendants could not be wronged in any way by going to trial on the information filed, and if the state saw fit to embrace different dates, the only result would be that the action tried would bar the prosecution for the same crime between the dates alleged, which the respondents could not complain of.

In any event, the demurrer should only have been sustained to that portion of the information which charged the commission of the crime at divers and different other dates, etc. If the commission of the crime at those times could not be proven, it was not because a definite crime had not been charged, but because that portion of the information objected to was surplusage, and there was still left the definite and distinct charge that the crime was committed on the 5th day of April, A. D. 1909, and respondents should have been compelled to answer to it. This may not be the general practice in the trial of criminal actions, but obviously it ought to be.

[No. 8327. Department One. January 10, 1910.]

**BRADLEY ENGINEERING AND MANUFACTURING COMPANY,
Respondent, v. E. M. HEYBURN, *Appellant*.¹**

BILLS AND NOTES—ACCOMMODATION MAKERS—STATUTES—CONSTRUCTION. The negotiable instruments act was intended to change the law with reference to the liability of accommodation parties who signed as joint makers of a promissory note.

SAME—DEFENSES—STATUTES—CONSTRUCTION. Section 58 of the negotiable instruments act (Laws 1899, p. 351), providing that a note in the hands of any holder other than a holder in due course is subject to the same defenses as if it were nonnegotiable, must be construed in connection with other sections of the act restricting the defenses, and refers only to such defenses as are permitted by the act itself, or such as do not deny the tenor of the bill.

BILLS AND NOTES—ACCOMMODATION MAKER—DISCHARGE—EXTENSION OF TIME OF DEBTOR. Under the negotiable instruments act, Laws 1899, p. 346, § 29, defining an accommodation party as one who signed as maker and who is made liable notwithstanding notice to a holder for value, and § 60, providing that the maker engages to pay it according to its tenor, and § 192 defining a person "primarily" liable as one who is absolutely required to pay, an accommodation maker of a note is not discharged by an extension of time to the principal debtor, and therefore cannot show by parol that he signed only as surety.

SAME—HOLDERS FOR VALUE AND IN DUE COURSE. Under the negotiable instruments act, a holder for value and a holder in due course are in the same position to challenge any defense based upon a collateral agreement or upon equities existing between the makers by holding up the instrument itself.

JUDGMENT—BAR—PARTIES CONCLUDED—JOINT DEBTOR BEYOND JURISDICTION. An unsatisfied judgment in another state against one of two joint makers of a note does not bar another action on the note in this state against the other maker who was beyond the jurisdiction and not a party to the other suit.

MORTGAGES—BILLS AND NOTES—SECURITY—APPLICATION. Under the negotiable instruments act, a holder for value of notes secured by mortgage can apply the proceeds of foreclosure to the payment of any one or all of the notes without observing the equities existing between joint makers who were all primarily liable thereon.

¹Reported in 106 Pac. 170.

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Appeal from a judgment of the superior court for Spokane county, Kennan, J., entered January 7, 1909, upon findings in favor of the plaintiff, in an action upon a promissory note. Affirmed.

Caleb Jones, for appellant.

B. B. Adams, for respondent.

CHADWICK, J.—The respondent brought this action to recover upon two promissory notes, executed by the Shaughnessy Hill Lead-Silver Mining Company, a corporation, E. M. Heyburn, and E. R. Ward. The complaint is the ordinary complaint upon a promissory note, in the usual form. The corporation was not served and did not appear in the action. E. R. Ward made default. E. M. Heyburn appeared, and without denying the notes, alleged that they were given in payment for certain mining machinery sold by the plaintiff to the defendant corporation, in which he had no interest other than as a stockholder therein; that while he signed the notes in the apparent capacity of a joint maker, he was in fact an accommodation maker and surety thereon, and received none of the benefits thereof, which facts were well known to the plaintiff, and that the plaintiff thereafter, without defendant's knowledge or consent and for a valuable consideration, extended the time of payment of the notes. The answer as a further defense alleged payment of the notes. Plaintiff's demurrer was sustained to the plea of release. The case was tried upon the issue raised by the plea of payment. The court found against the defendant upon that issue, and entered a judgment as prayed for in the complaint. The defendant E. M. Heyburn appeals.

Appellant argues that the court erred in sustaining the demurrer to the answer, for the reason that he was an accommodation maker, which fact may be shown by parol; that he was bound only as a surety, and that the extension of time to the principal released appellant as such surety. *Baldwin v. Daly*, 41 Wash. 416, 83 Pac. 724, and *Spencer v. Alki Point*

Transportation Co., 53 Wash. 77, 101 Pac. 509, are relied upon to sustain this contention. The latter case is not in point; for, aside from the fact that it appeared that the indorser was a surety in fact and entitled to the protection afforded sureties, it is settled by an almost unbroken line of authority that a corporation may plead *ultra vires* as a defense to a contract of suretyship, when sued by one who has knowledge of the original relation of the parties. Ogden, *Negotiable Instruments*, § 124. Aside from this consideration, it is generally held that §§ 29 and 64 of the negotiable instruments law (Laws 1899, p. 351, ch. 149) are inapplicable to corporations. Crawford, *Annotated Negotiable Instruments Law* (3d ed.), p. 46, and cases there cited.

In *Baldwin v. Daly*, the court said:

"The ruling of the trial court, to the effect that it is incompetent for one of two or more makers of a joint and several promissory note to show by parol that he is in fact only a surety, and that he was known to be such by the payee named in the note when the note was taken, is contrary to the ruling of this court in *Culbertson v. Wilcox*, 11 Wash. 522, 39 Pac. 954, and *Bank of British Columbia v. Jeffs*, 15 Wash. 230, 46 Pac. 247."

The cases upon which that statement was based were decided before the passage of the negotiable instruments act, which clearly and intentionally changed the law in that respect (Laws 1899, p. 351, ch. 149). Aside from this, it appears upon the face of the decision that such statement of the rule was dictum, for the opinion states: "It is apparent, however, that this question is not a material one here, unless it is to be held that the appellant Peter was entitled to show that the respondent had released him from liability on the note." And it was then held that a release by parol could not be shown.

But these cases must henceforth be resolved independently of all decisions based upon the law merchant, notwithstanding the contention of appellant that the negotiable instruments act in no way affects the rights or changes the relation of the

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original parties to the contract. To sustain his theory that it does not do so, appellant cites section 58 of the law: "In the hands of any holder other than a holder in due course, a negotiable instrument is subject to the same defenses as if it were non-negotiable" Laws 1899, chap. 149, p. 351, § 58. If this section stood alone, there is reason for appellant's contention; but it is a primary rule of construction that one section of a statute must be considered with reference to others, so that the legislative intent may not be defeated. Looking, then, to the whole law and not to the particular section, we find that it is also declared:

"Sec. 29. An accommodation party is one who has signed the instrument as maker, drawer, acceptor or indorser, without receiving value therefor, and for the purpose of lending his name to some other person. Such a person is liable on the instrument to a holder for value, notwithstanding such holder at the time of taking the instrument knew him to be only an accommodation party."

"Sec. 60. The maker of a negotiable instrument by making it engages that he will pay it according to its tenor, and admits the existence of the payee and his then capacity to endorse."

When construed in the light of these sections, section 58 cannot be made to bear the construction put upon it by appellant. The law further provides:

"Sec. 26. Where value has at any time been given for the instrument, the holder is deemed a holder for value in respect to all parties who became such prior to that time."

"Sec. 52. A holder in due course is a holder who has taken the instrument under the following conditions:

"(3) That he took it in good faith and for value;"

"Sec. 59. Every holder is deemed *prima facie* to be a holder in due course;"

When we consider that it was the object of the negotiable instruments act to make such instrument certain and to speak the true contract of the parties, thus saving the commercial world the hazard of trumped up defenses or the peril of trying out collateral issues such as suretyship, etc., in case of

suit, it would seem that we cannot reject the other sections and give effect only to section 58.

Our conclusion is further fortified by section 192: "The person 'primarily' liable on an instrument is the person who by the terms of the instrument is absolutely required to pay same. All other persons are 'secondarily' liable." This section not only fixes an absolute liability on the one who, by the terms of the instrument, binds himself without qualification, but furnishes a rule of evidence as well. Nor do we think that this construction renders section 58 meaningless. The defenses there referred to must be held to be only such defenses as are permitted by the act itself, or such equities as do not deny the tenor of the bill.

Appellant admits that, if respondent was a holder in due course, he could not plead his present defense. We find no case in which this exact question was presented, but in the case of *Hermann's Extrs. v. Gregory* (Ky.), 115 S. W. 809, it was held, in construing § 26, no particular reference being made to § 52, which might well have been done as it seems to us, that one who had taken the note of another and had paid another note owing by the maker to a bank, was a holder for value, and a defense of no consideration could not be set up. A holder for value, therefore, and a holder in due course are in the same position to challenge any defense based upon a collateral agreement or upon equities existing between the makers by holding up the instrument itself. This construction harmonizes the several provisions of the law, and makes effectual the purpose of the law to make negotiable instruments in fact what they have been only in theory under the law merchant, a certain medium of commercial exchange. Our conclusion also harmonizes with the several decisions of this court which are collected in *Anderson v. Mitchell*, 51 Wash. 265, 98 Pac. 751, wherein we held, without reference to the negotiable instruments act, that one who signed as maker was bound by the terms of his obligation. Being primarily liable as an accommodation maker, appellant was not

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discharged by an extension of time to the principal debtor. Eaton & Gilbert, Commercial Paper, § 123f; *Vanderford v. Farmers & Mechanics Nat. Bank*, 106 Md. 69, 66 Atl. 47, 10 L. R. A. (N. S.) 129, and note; *Wolstenholme v. Smith*, 84 Utah 300, 97 Pac. 329; *Cellers v. Meachem*, 49 Ore. 186, 89 Pac. 426, 10 L. R. A. (N. S.) 133.

On the trial it appeared that a chattel mortgage had been given to secure the payment of the notes made by appellant, as well as another note made by the corporation after his active participation in its affairs had ceased. After these several notes became due, an action was brought in the state of Montana where the property was then situate to foreclose the chattel mortgage. Appellant was a nonresident of Montana, and did not appear in that action. A foreclosure and sale resulted in a partial satisfaction of the judgment, the note of the corporation being paid off, and a slight sum being credited upon the obligations made by appellant.

It is urged that the notes sued on became merged in the judgment and that an independent action cannot now be maintained. The fact that the appellant was a nonresident and made no appearance in that action takes this case without the rule relied upon by the appellant.

“An unsatisfied judgment against one of two joint debtors does not bar a subsequent action upon the original claim against the other, where the latter, at the time the first suit was brought, was without the jurisdiction of the state and beyond the reach of legal service.” 23 Cyc. 1209.

See, also, 24 Am. & Eng. Ency. Law (2d ed.), 760, 761; 2 Black, Judgments (1st ed.), § 771.

Appellant also argues that he was released by reason of the fact that he was deprived of the benefit of the security which was given by the maker at the time or after the notes were made. It was the recollection of appellant that a bill of sale was executed at the time the first notes were made and delivered. A careful reading of the testimony convinces us that the recollection of appellant in this regard is not borne

out. It was not pleaded in his answer. The court made no finding that any instrument in the way of security other than the chattel mortgage was given, nor did appellant request any such finding. If it were true that a bill of sale had been given, it might be that appellant could claim credit for the reasonable value of the property as against a subsequent chattel mortgage. But there is no testimony to warrant us in holding that a bill of sale was in fact ever given. Whatever the hardship of the rule may be generally, and particularly as applied to this case, respondent was not bound to observe any equities existing between the Shaughnessy Hill Company and appellant, but might apply the proceeds of the sale under the foreclosure to the payment of any one or all of the notes as it saw fit. *Smythe v. New England Loan & Trust Co.*, 12 Wash. 424, 41 Pac. 184.

There is no error in the record and the judgment must be affirmed.

RUDKIN, C. J., FULLERTON, GOSE, and MORRIS, JJ., concur.

[No. 7873. Department Two. January 12, 1910.]

C. C. KNUTSON, *Respondent*, v. FRED FREDLUND, *Appellant*.¹

MINES AND MINERALS—LOCATION NOTICES—SUFFICIENT STATE REGULATIONS. A mineral relocation notice is insufficient and inadmissible in evidence under Laws 1899, p. 69, § 1, where it fails to state the length claimed on each side of the discovery, the general course of the lode, or to identify the claim by reference to natural monuments as required by that act; since compliance with state laws not inconsistent with the Federal statutes is essential to a valid relocation.

SAME—ACTION TO RECOVER POSSESSION—DEFENSES—AMENDED NOTICES. In an action to recover possession of a mining claim, the defendant cannot base any right upon amended relocation notices posted by him after the commencement of the action.

SAME—ASSESSMENT WORK—FORFEITURE—SUPERIOR TITLE. In an action to recover possession of a mining claim, a defendant holding

¹Reported in 106 Pac. 200.

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under an invalid relocation is not entitled to attack plaintiff's title by reason of his failure to do assessment work, as such failure did not work a forfeiture until valid relocation was made.

SAME—RESUMPTION OF WORK—FORFEITURE. A resumption of assessment work prior to the lawful inception of intervening rights, saves a forfeiture for failure to do the required work.

Appeal from a judgment of the superior court for Stevens county, Carey, J., entered May 18, 1908, in favor of the plaintiff, by direction of the court, after a trial before the court and a jury, in an action to recover mining claims. Affirmed.

Judson & Rochford, for appellant.

C. S. Voorhees, Reese H. Voorhees, and F. Y. Wilson, for respondent.

CROW, J.—This action was commenced by C. C. Knutson against Rasmus Malde, Harry Bodey, Mrs. Harry Bodey, Mrs. Rose Crocker, and Fred Fredlund, to recover possession of two unpatented mining claims in Stevens county. From a judgment in plaintiff's favor, the defendant Fred Fredlund has appealed.

The claims were originally located in 1896, by C. C. Knutson and others, but by mesne conveyances and judicial proceedings they subsequently passed to the respondent, C. C. Knutson, alone. The appellant, Fred Fredlund (all other defendants having disclaimed), predicated his rights upon alleged relocations made by him in December, 1906, he claiming that the original locations made by Knutson and others had been abandoned, because the respondent Knutson and his predecessors in interest had failed to do the required assessment work thereon. On the trial the respondent, by competent evidence, made proof of the original locations in 1896, deraigned his title therefrom, and rested without showing the assessment work done. Appellant thereupon offered in evidence the notices under which he claimed his relocations, but upon respondent's objection they were rejected. Thereafter

he offered to show that respondent had not done the required assessment work for the year 1905, which offer was rejected upon the theory that the appellant, not having made any valid relocations, was not entitled to show that respondent's assessment work had not been done. Appellant's alleged relocations were made subsequent to the enactment of chapter 44, page 69, Laws 1899, and the sufficiency of his notices must be measured, not only by the Federal laws, but also by that statute, section 1 of which reads as follows:

"The discoverer of a lode shall within ninety (90) days from the date of discovery, record in the office of the auditor of the county in which such lode is found, a notice containing the name or names of the locators, the date of the location, the number of feet in length claimed on each side of the discovery, the general course of the lode and such a description of the claim or claims located by reference to such natural object or permanent monument as will identify the claim."

Ten assignments of error are made by appellant, but the controlling questions on this appeal are, (1) whether his location notices were sufficient and should have been admitted in evidence, and (2) whether he was entitled to show that the respondent had abandoned his claims by failing to do required assessment work.

Appellant's location notices failed to comply with the requirements of the statute of this state. They did not designate the point of discovery. There was no attempt to indicate "the number of feet in length claimed on each side of the discovery," to state "the general course of the lode," or to describe the claim by reference to any natural monument so as to identify it. The right of the states to legislate upon the subject of mining locations and location notices and to make requirements of locators in addition to, but not inconsistent with, those made by Congress, has been repeatedly upheld by the Federal and state courts. *Belk v. Meagher*, 104 U. S. 279; *Baker v. Butte City Water Co.*, 28 Mont. 222, 72 Pac. 617, 104 Pac. 683; *Butte City Water Co. v. Baker*, 196 U. S. 119; *Wolfley v. Lebanon Mining Co.*, 4 Colo. 112; *Sisson v.*

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Sommers, 24 Nev. 379, 55 Pac. 829; *Northmore v. Simmons*, 97 Fed. 386. To make valid relocations of the alleged abandoned claims it was therefore obligatory upon the appellant to comply with the statute of this state in preparing and recording his location notices. In *Sisson v. Sommers*, *supra*, the supreme court of Nevada said:

“To enable a party to maintain a right to a mining claim after the right is acquired, it is necessary that the party continue substantially to comply, not only with the laws of Congress, but with the valid laws of the state and valid rules established by the miners, in force in the district where the claim is situated upon which such right depends. Failure to comply with such laws and rules works a forfeiture, whether the laws and rules provide for forfeiture for noncompliance or not, and the mining claim becomes subject to location by any qualified locator.”

In *Purdum v. Laddin*, 23 Mont. 387, 59 Pac. 153, the court said:

“Section 3612 of the Political Code provides that, within 90 days from the date of posting upon the claim the location notice required by section 3611, there must be filed with the county clerk a declaratory statement, which must contain, among other things: ‘7. The location and description of each corner, with the markings thereon.’ The statute is mandatory, and substantial compliance with its provisions is necessary to perfect a valid location. ‘A location is not made by taking possession alone, but by working on the ground, recording, and doing whatever else is required for that purpose by the acts of congress and the local laws and regulations.’ (*Belk v. Meagher*, 104 U. S. 284, 26 L. Ed. 735; *Garfield M. & Mining Co. v. Hammer*, 6 Mont. 53, 8 Pac. 153.) That the legislative assembly had power to enact sections 3610 to 3613 of the Political Code is, in this state, too firmly established to permit of serious discussion or doubt; and that the provisions of these sections are mandatory, reasonable and not in conflict with any act of Congress, seems clearly within the principles announced or tacitly recognized in *O'Donnell v. Glenn*, 8 Mont. 248, 19 Pac. 302; *McCowan v. McClay*, 16 Mont. 234, 40 Pac. 602, and *Sanders v. Noble*, 22 Mont. 119, 55 Pac. 1037.”

Appellant's notices of the relocation of the claims were properly rejected. Some time after the commencement of this action, the appellant prepared, posted, and filed amended notices, which he also offered in evidence, but which were likewise rejected by the trial court. They failed to cure the defects of the original notices, and without regard to other objections to their competency, were for that reason properly excluded.

After the trial judge had refused to admit the appellant's notices in evidence, he properly held that the appellant was in no position to offer any evidence for the purpose of showing that the respondent or his predecessors in interest had not done the required assessment work for the year 1905. In passing upon this question the supreme court of Montana said:

"Appellants further allege that the W. W. Dixon lode was forfeited because of the failure of respondent to do the necessary annual work upon the claim for the years 1897 and 1898. The purpose of annual representation is to enable the locator to hold his claim as against all persons. It is not required for any purpose which affects the general government. (2 Lindley, Mines (2d ed.), § 624, and cases.) The government cannot forfeit the claim if the annual representation has not been placed upon it. In order to make the want of annual representation effective, the ground must be entered and located by another person. We have seen that the pretended entry and location by the appellants was absolutely void and of no effect, and therefore they cannot raise the question as to the sufficiency of representation work." *Wilson v. Freeman*, 29 Mont. 470, 75 Pac. 84, 68 L. R. A. 833.

Appellant's only purpose in attempting to show respondent's alleged nonperformance of work was to establish a forfeiture of respondent's claims. No forfeiture would result from nonperformance of labor unless a valid relocation was made by some third party before work was resumed by respondent. Appellant made no valid relocation. It is manifest that he did not by any act of his cause a forfeiture of

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respondent's right to resume work, and that he is, therefore, in no position to question the amount of work respondent has done or has failed to do.

"A forfeiture does not ensue from the mere failure to comply with the law. It requires the intervention of a third party, and a relocation of the ground before any forfeiture can arise. When thereby such forfeiture becomes effectual, the estate of the original locator is hopelessly lost, and there is no possibility of its being restored. The statute provides that,—'Upon a failure to comply with these conditions, the claim or mine upon which such failure occurs shall be open to relocation in the same manner as if no location of the same had ever been made; provided, that the original locators, their heirs, assigns, or legal representatives, have not resumed work upon the claim after failure and before such location.' Resumption of work at any time prior to the lawful inception of an intervening right *prevents* forfeiture. It does not restore a lost estate." 2 Lindley, Mines (2d ed.), § 651.

See, also, 27 Cyc. 595-6; *Belk v. Meagher*, *supra*; *Pharis v. Muldoon*, 75 Cal. 284, 17 Pac. 70; *McGinnis v. Egbert*, 8 Colo. 41, 5 Pac. 652; *Lacey v. Woodward*, 5 N. M. 588, 25 Pac. 785.

We find no prejudicial error in the record. The judgment is affirmed.

RUDKIN, C. J., DUNBAR, PARKER, and MOUNT, JJ., concur.

[No. 7976. Department Two. January 12, 1910.]

HOWARD G. CRAIG, *Appellant*, v. GREAT NORTHERN RAILWAY
COMPANY *et al.*, *Respondents*.¹

MASTER AND SERVANT—NEGLIGENCE OF MASTER—DEFECTIVE BRAKES—PROXIMATE CAUSE—CONTRIBUTORY NEGLIGENCE. The conductor of a street car, injured in a collision at a railroad crossing, is guilty of contributory negligence which is the proximate cause of the accident, where it appears that he and the motorman knew that the brakes on a large suburban car were out of order and would not stop the car readily, that he permitted the motorman to approach the railroad crossing at a speed of thirty miles an hour until within seventy-five feet of the crossing without making any effort to reduce the speed, although he had power to control the car by signals, and knew the location, in violation of the rule against crossing without coming to a stop and going ahead to see if the crossing was clear.

SAME—FELLOW SERVANTS. In such a case, if the negligent rate of speed was the fault of the motorman, it was the act of a fellow servant, precluding any recovery by the conductor.

DUNBAR and PARKER, JJ., dissent.

Appeal from a judgment of the superior court for Spokane county, Kennan, J., entered September 19, 1908, in favor of the defendant, by direction of the court, after a trial before the court and a jury, in an action for injuries sustained by a conductor of a street car in a collision. Affirmed.

Fred Miller and *George A. Latimer*, for appellant.

H. M. Stephens, for respondent Washington Water Power Company.

MOUNT, J.—The plaintiff was employed as a conductor on one of the cars of the defendant Washington Water Power Company, which company operates a street car system in the city of Spokane. While so employed and in charge of one of its cars, plaintiff was injured by a collision of said car with an engine of the railway company, at a crossing of the tracks

¹Reported in 106 Pac. 155.

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of the defendants, which he alleges was by reason of the negligence of both defendants. The cause proceeded to trial before the court and a jury, and at the close of the plaintiff's evidence, the court, upon separate motions of both the railway company and the power company, withdrew the cause from the jury and entered judgment separately, dismissing the case. No error is assigned upon the dismissal as to the railway company. The negligence alleged against the power company is, in substance, that it negligently furnished for the plaintiff and motorman an old, unfit, and defective car, said car being out of repair, the air brakes and other apparatus employed in controlling the same being old, defective, and insufficient, so that said car could not be controlled by means of said apparatus provided therefor; that the hand brakes and other apparatus for controlling the car were old, defective, and out of repair, so that the car would not respond to the application thereof, as was at the time well known to defendant power company; and that, by reason of such defective brakes and their refusal to work or to control the movements of the car, it passed upon the track of the railway company and came in collision with an engine running thereon at a high rate of speed, resulting in plaintiff's injuries.

The dismissal by the court as to the power company was upon the ground that the injuries of which appellant complains were caused by the negligence of the motorman in running at an excessive rate of speed, and in failing to properly apply the brakes, and not by the defective condition thereof, and being the negligence of a fellow servant, was not such as rendered the power company liable. From the order and judgment of the learned trial court thus disposing of the cause, plaintiff appeals, bringing all of the evidence here for our review upon the errors assigned.

The question presented is, Was there sufficient evidence of the power company's negligence being a proximate cause of the injury to entitle plaintiff to have that question sub-

mitted to the jury? From the evidence the following appears. The accident occurred at the crossing of the tracks of the railway company and the power company, by an engine of the railway company coming in collision with a car of the power company on which appellant was working as conductor, while the car was crossing the railway company's track, the motorman having failed to stop the car before reaching the crossing, as required by the rules of the power company, to enable the conductor to get off the car, see that the railway track was clear and no trains approaching thereon, and then signal the motorman to go ahead; this rule being well known to both the appellant and motorman as a requirement of the power company as to all steam railway crossings.

The line upon which the accident occurred, and on which the car in charge of appellant and the motorman was running, is known as the Minnehaha line, and runs from the junction of Howard street and Riverside avenue, as a starting point, near the center of the city, several miles to the suburbs, making the round trip in one hour. The accident occurred January 27, 1907, about 8:20 p. m. Appellant had been working for the power company as a conductor for some time previously, but not upon this line. He commenced on this line and on this car at 4:38 p. m., that day, starting from Howard street and Riverside avenue. Three full round trips had been made, and it was upon the return of the fourth trip that the accident occurred. At this last time of approaching the railway crossing, it is claimed by appellant that the brakes on the car failed to work when the motorman attempted to stop, as the rules required, and for that reason alone, the car ran upon the crossing, when it was struck by a rapidly moving engine of the railway company, resulting in injuries to appellant and also injuries to the motorman from which he died a few hours later.

Substantially all of the evidence in the record relating to the condition of the brakes on the car and the cause of the

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accident is that contained in the testimony of the appellant himself, the substance of which is contained in the following:

“Q. When a car is on a run where is it inspected? A. If you complain about it the inspector does. Q. What inspector, the one on duty where? A. At Howard and Riverside. . . . Q. Now had you on that run observed whether the gripman, or the motorman, was having any difficulty stopping at the crossings? A. Yes, I took notice after he reported it at Howard and Riverside, and I noticed on two or three occasions he ran past several passengers and had to back up for them. . . . Q. What, if any, warning signal did you get of the approach of the engine? A. I could feel the car kind of jumping as we was getting to the end of the line. . . . Q. Did you see the motorman, what was he doing at the time it was struck? A. He had the emergency on when I went on under the curtain. He put it on at five, and then at full speed, and then it hitched. . . . Q. What is the emergency? A. That is one way of stopping the car. Q. Is that the most extreme way of stopping the car? A. They generally use that when nothing else will work. . . . Q. Did you see him apply the air? A. No, I did not see him apply the air. Just seen he had the emergency on. Q. Did it stop when he put the emergency on? A. No, sir, it was still running. . . .

“Q. It was your business, if the car was out of repair, to take it into the shop? A. It was my business, if the car was out of repair, to report it to the inspector at Howard and Riverside, and he gave instructions and I obeyed them. Q. You weren't entitled to take a car into the shops without orders from the inspector at Howard and Riverside? A. Yes, sir. Q. Who was inspector on this 27th of January, 1907? A. I don't know. I know he said, 'I am going to report this car to the inspector.' Q. Who said that? A. Nickerson (motorman). I heard some one tell him to go ahead and I will have a car when you come back. Q. Who told him that? A. I don't know who, whether it was Sweeney or August. . . . Q. You don't know whether it was Sweeney's or Quaas' voice? A. No. Q. You are not able to swear? A. I presume it was an inspector. Q. I am asking you what you are willing to swear to; are you willing to swear that it was either Quass or Sweeney or any other inspector at Howard and Riverside that gave that kind of an order? A. Yes, I believe I am. Q. Which one was it? A. Well, I think I

would swear it was Mr. Sweeney. Q. All right. Now, you saw Sweeney there then? A. I did not. Q. Didn't you see him? A. I just judged him from the voice. Q. What time of day was it? A. 7:38. . . . Q. When was it you saw this maneuvering by the motorman? A. When I stepped under the curtain. And I saw him push it around and when he pulled it the fire came out. That is as far as I can remember. Q. What did he do when he threw the reverse lever? A. He put on the current. He had the current off when I entered. .

"Q. At what speed was that car going when you were going through the car, for instance? A. I presume he had it checked to half speed when I was going through the car. Q. Well, now, had it been going on ten points anywhere from the park to the railroad? A. He fed it right up, right from where he picked up the last passenger. . . . Q. And he kept it at that full speed to where? A. I was inside. I could not tell you. I felt the car commence jerking. Q. From the school house, then, until you felt the jerking, the car was going full speed? A. Yes, sir. Q. On ten points? A. Until about 75 feet from the railroad. Q. You mean the car commenced to jerk when you were within 75 feet of the railroad? A. Yes, sir, commenced to catching and letting it go, like that, the wheels was sliding, or something. . . . A. I told you it was running about half speed. He got it checked at a half speed and after he seen he could not stop he fed it up full speed, which he was in the act of doing when I entered at his back. . Q. What would you say it was running, 15 or 20 miles an hour, or not? A. I would think they run about 30 miles an hour. Q. And at that rate of speed, within this 75 feet he had checked it one-half? A. No, I said he started to check the car in about 75 feet of the railroad. . . .

"Q. Now, on this occasion, had you or not paid any attention to the operation of the car and did you know anything about the condition of the brakes before you started on this end of the trip? A. After he reported it to the inspector, yes. Q. So you knew the brakes were out of order? A. I knew the brakes was not working. Q. So you knew exactly the condition of that car before you started on that last trip? A. Principally after it had started and I found how it worked. Q. And you knew before you started back from the end of the car line, the condition of those brakes, whatever that condition was? A. Yes, I found out they worked just about like they did when we reported it there at Howard and Riverside

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when starting on that trip. Q. You had noticed when you heard him make this report at Howard and Riverside, you commenced to notice it? A. Yes, sir. Q. And you knew all about it before you got to the end of the car line, didn't you? A. I knew it was mighty hard to handle, and he could not stop whenever he wanted to exactly, that is within 10 or 15 feet. . . . Q. And you made all those stops all right, didn't you? A. Well, with the exception he had to throw off his current a good deal farther out that he did when his car was in perfect working order. Q. Well, he made the stops all right? A. Yes. He made some of them pretty close to the railroad I considered. Q. You knew that before you reached the end of the car line? A. Yes, sir. . . .

"Q. You say this current when on ten points is on at full speed? A. Yes, sir. Q. And it is impossible to run a street car any faster than the speed it is on when it is on the ten points? A. Unless it is on a high voltage. . . . Q. The car you had, car 87, it was at full speed when at ten points? A. Yes, sir. . . . Q. And it went full speed without making any stop until the car got within about seventy-five feet of the track? A. Yes, sir. Q. And then he started to stop it? A. Yes."

Appellant also testified that the car was one of the largest cars of the company, "one of those big, heavy, aisle cars," about thirty-seven feet in length. Here is a case where the motorman and conductor were both men of experience. They could judge the speed of the car; they knew where they were at all times; they knew the brakes of their car were not working right, and that the car frequently on that account ran by crossings where passengers required the car to stop; they knew they were coming to a steam railway crossing where they were required to stop the car and flag across such crossing. They ran this car at the rate of thirty miles per hour up to within seventy-five feet of the railroad crossing before attempting to stop. It would seem at least doubtful whether a heavy car, thirty-seven feet in length, traveling at the rate of thirty miles per hour, could be stopped at within twice its length. It certainly could not be stopped with any degree of comfort to its eleven passengers.

But if we assume that it could be stopped within that distance, it seems too clear for controversy that the motorman was guilty of wanton carelessness in maintaining such a rate of speed up to within seventy-five feet of the crossing, before attempting to stop, when he knew that the brakes of the car were out of repair. This great speed of the car was clearly the proximate cause of the accident. The motorman was inexcusable for maintaining such speed under such circumstances. It is claimed that the conductor was not responsible for the acts of the motorman. The evidence of the conductor himself was that it was the duty of the motorman to stop the car upon a signal from the conductor. The conductor knew where the car was. He knew the rate of speed at which the car was traveling, and he knew the condition of the car. The car was in his control, and he was as much responsible for the speed of the car as the motorman. But if he were not, he was a fellow servant with the motorman, and the company was not liable to him for the negligence of a fellow servant. *Grim v. Olympia Light & Power Co.*, 42 Wash. 119, 84 Pac. 635; *Berg v. Seattle, Renton & Southern R. Co.*, 44 Wash. 14, 87 Pac. 34, 120 Am. St. 968.

The evidence here shows that the negligence which caused the accident was that of the appellant and not of the company, and therefore the trial court properly dismissed the action. The order appealed from is therefore affirmed.

RUDKIN, C. J., and CROW, J., concur.

DUNBAR, J. (dissenting)—I dissent. I don't think the doctrine of fellow servant applies and the other question discussed was plainly for the jury.

PARKER, J., concurs with DUNBAR, J.

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[No. 8311. Department Two. January 12, 1910.]

ZORA E. LOEPER, Appellant, v. W. F. LOEPER, Respondent.¹

APPEAL—DECISION—EFFECT OF REVERSAL—JUDGMENT—RES JUDICATION. Where there were no findings of fact or bill of exceptions and no trial *de novo*, and judgment against the defendant was reversed for error in awarding plaintiff relief outside the issues, the cause stands for retrial and the decision is not *res judicata*.

HUSBAND AND WIFE—COMMUNITY OR SEPARATE PROPERTY. Property acquired by the husband prior to his marriage, and to which neither the plaintiff nor the community contributed, is the separate property of the husband.

Appeal from a judgment of the superior court for Spokane county, Kennan, J., entered June 9, 1909, upon findings in favor of the defendant, in an action to quiet title. Affirmed.

Frederick W. Dewart, for appellant.

Danson & Williams, for respondent.

MOUNT, J.—This is the second appeal in this case. When it was here before upon the appeal of the present respondent, the judgment was reversed. *Loeper v. Loeper*, 51 Wash. 682, 99 Pac. 1029. At that time we said:

“No findings of fact were made by the trial court, and there is no statement of facts or bill of exceptions in the record; so that this court can only look to the pleadings and judgment for guidance. From these we are unable to say that the court would have granted the appellant judgment quieting his title, independent of the payment to the respondent of the sum of \$500, nor does it appear that he was entitled to such relief. The judgment must therefore be reversed in its entirety in so far as the cross-action is concerned, and it is so ordered.”

The cross-action was one setting up the separate character of certain real estate, and to quiet title against the claims of the present appellant. When the cause was remanded to the lower court, it was set down for hearing upon the allegations

¹Reported in 106 Pac. 183.

of the cross-complaint. The plaintiff, who is now the appellant, objected to this, upon the ground that the lower court had no jurisdiction. This objection was overruled, and the court proceeded to the trial of the issues raised by the cross-complaint, found that the property in question was the separate property of the defendant, and entered a decree quieting title in defendant against the claims of the appellant, and the plaintiff now appeals.

The appellant argues that the judgment of this court is final and conclusive, and that the lower court was therefore without jurisdiction other than to enter such judgment as this court directed. This contention is no doubt correct where the case is tried here *de novo* and all the issues settled, as in the cases of *State ex rel. Wolferman v. Superior Court*, 7 Wash. 234, 34 Pac. 930, and *Cochrane v. Van de Vanter*, 13 Wash. 323, 43 Pac. 42, relied upon by the appellant. But on the former appeal the cause was not tried here *de novo*. It rested wholly upon a question of law. The facts were not brought here and no final adjudication was made upon the facts. The case was simply reversed "in so far as the cross-action is concerned." The simple reversal, without any order of dismissal, implied that the lower court should take some further action in the matter, and either grant or deny the relief demanded. The reversal merely set aside the judgment appealed from and left the rights of the parties undetermined. In the absence of a determination of the issues by this court, jurisdiction necessarily rested in the trial court to determine the issues raised by the cross-complaint. It was therefore not error for the trial court to determine these issues and pronounce a judgment thereon.

Appellant also argues that the court erred in finding that she had no interest in the property in question. But the evidence seems conclusive that the property in question was acquired by respondent prior to his marriage with appellant, and that neither the appellant nor the community con-

sisting of these two contributed anything to its improvement.

We think the judgment is in accordance with the evidence, and it must therefore be affirmed.

RUDKIN, C. J., CROW, and PARKER, JJ., concur.

[No. 8496. Department Two. January 12, 1910.]

THE STATE OF WASHINGTON, *on the Relation of Seattle
General Contract Company et al., Plaintiff*, v. THE
SUPERIOR COURT FOR KING COUNTY *et al.*,
*Respondents.*¹

APPEAL—DECISION REVIEWABLE—FINALITY. An order for the inspection of papers under Bal. Code, § 6047, is not a final order from which an appeal can be taken directly.

CERTIORARI—ADEQUATE REMEDY BY APPEAL—DISCOVERY — INSPECTION OF PAPERS. Certiorari does not lie to review an order for the inspection of papers, made under Bal. Code, § 6047, since there is an adequate remedy by appeal from the final judgment.

DISCOVERY—POWER TO ORDER INSPECTION OF PAPERS—APPEAL. Bal. Code, § 6047, authorizing the court to order an inspection of papers material as evidence in a cause, does not contemplate an inspection of confidential and privileged matter not admissible in evidence; and the party may refuse to submit to the invasion of private rights and appeal from a judgment of contempt.

Certiorari to review an order of the superior court for King county, Shackleford, J., entered November 20, 1909, for the inspection of records. Writ quashed.

Hughes, McMicken, Dovell & Ramsey, Roberts, Battle, Hulbert & Tennant, and Morris B. Sachs, for relators.

George E. de Steiguer and Harold Preston, for respondents.

¹Reported in 106 Pac. 150.

MOUNT, J.—The relators by this proceeding seek to review an order of the lower court directing an inspection of certain documents in the possession of the relators. It appears that C. D. Bussell and others brought an action in the lower court against E. W. Ross, commissioner of public lands for the state of Washington, and the relators herein, seeking an accounting for the cost of filling in certain tide lands by the relators, under a contract with the state entered into pursuant to the act of March 9, 1893, Laws 1893, p. 241, which tide lands were alleged to have been purchased by the said plaintiffs from the state subsequent to and subject to said contract; and also seeking a restraining order to prevent the commissioner of public lands from issuing certificates to the relators, which certificates become a lien upon such lands for a greater amount than the actual cost of such fill.

After the service and filing of the complaint in that action, the parties therein filed and served a motion for an inspection and leave to copy certain books and papers of the relators, under Bal. Code, § 6047. At the hearing upon this motion, the defendants appeared and demurred to the complaint, upon the ground that it did not state a cause of action; and also objected to the granting of the motion, for the reason that the court was without jurisdiction to make the order because the complaint failed to state a cause of action, and because no showing by affidavit was made as to the materiality of the books and papers, or that such books and papers contained evidence material to any issue, or upon the merits, and because the application was prematurely made before issues of fact were joined. The court denied these objections, and entered an order for an inspection of certain books and papers. Relators thereupon applied to this court for a writ of certiorari to review this order, and the writ was issued.

The respondents have moved to quash the writ, upon the ground that the order is an interlocutory order and may be

reviewed upon appeal from any final judgment which may be entered in the cause. This motion must be granted. The statute authorizes the writ of review only where there is no appeal, and where there is no plain, speedy, and adequate remedy at law. Bal. Code, § 5741. This court has uniformly held that, where there is a plain, speedy, and adequate remedy by appeal in the ordinary course, the writ of certiorari will not issue. *State ex rel. Wilkeson Coal & Coke Co. v. Superior Court*, 49 Wash. 203, 94 Pac. 920; *State ex rel. Smith v. Superior Court*, 47 Wash. 508, 92 Pac. 349; *State ex rel. Weymouth v. Lockhart*, 28 Wash. 460, 68 Pac. 894. The order made in this case was not a final order. It was simply an interlocutory order made in the progress of the case. The statute under which the order was made provides: "Any court, or judge thereof, in which an action is pending may, upon notice, order either party to give to the other, within a specified time, an inspection and copy, or permission to take a copy, of any book, document, or paper in his possession, or under his control, containing evidence relating to the merits of the action or defense therein. If compliance with the order be refused, the court may exclude the book, document, or paper, from being given in evidence, or if wanted as evidence by the party applying, may direct the jury to presume it to be such as he alleges it to be, and the court may also punish the party refusing as for contempt." Bal. Code, §6047.

It is at once apparent that any order made under this statute for the production or inspection of books or papers, in an action pending, is an interlocutory order in such action. *Harris v. Richardson*, 92 Minn. 353, 100 N. W. 92. It is no more than a ruling upon an offer of evidence at the trial, and is no more final than any other ruling admitting or excluding evidence in a case. For that reason, no appeal can be taken directly from such ruling, even if error is manifest therein. Such rulings are reviewed upon the final judgment, and not otherwise. The fact that an appeal will not lie directly from such order is not sufficient basis for a writ of

review, because the party deeming himself aggrieved has an adequate remedy by appeal from the final judgment in the case. *State ex rel. Wilkeson Coal & Coke Co. v. Superior Court, supra*. In this case we said:

“The writ of review will not, however, be issued in all cases where the court has exceeded its jurisdiction. It will be issued only in cases where there is no appeal or where, in the judgment of the court, there is not any plain, speedy, and adequate remedy at law. The relator has a remedy by appeal, since the order attacked was one made in the course of the action and may be reviewed on appeal from the final judgment.”

Any other rule would result in interminable delay and confusion in the trial of cases.

Counsel for relators argue, in substance, that these books and papers are private property of the relators, and an inspection thereof by the plaintiffs in that action will result in an invasion of the private rights and possibly to the irreparable injury of the relators. The statute, of course, does not contemplate that the parties to an action may have an inspection of books and papers which are not material, or which on account of their confidential and privileged character could not be received in evidence, and if an order were made for the inspection of such books or papers, a party would be safe in refusing to submit to such order; and if the court should attempt to enforce obedience by a fine or imprisonment for contempt, the judgment imposing a penalty would be a final order which might be reviewed independently of the main case. *Lester v. Berkowitz*, 125 Ill. 307, 17 N. E. 706. But for books and papers, though private, which might properly be introduced in evidence in the case, the court clearly has a right to order an inspection thereof.

In the case of *Western Union Tel. Co. v. Locke*, 107 Ind. 9, 7 N. E. 579, the supreme court of Indiana, in discussing a case somewhat similar to this, said:

“It is very ingeniously and ably argued that great hardship might often result from error of a trial court in direct-

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ing the production of a document, but there are many cases in which the erroneous ruling of the trial court on a question arising in the course of the proceeding may produce great hardship, yet this consideration supplies no reason for allowing an appeal. The truth is, that in every case much must necessarily be left, in the first instance, to the sound judgment of the trial judge, and although he may err and thus cause serious injury to the party, still no appeal will lie until after the final judgment, for the case cannot be cut up into parts and tried by piecemeal. An error in compelling a party to give oral testimony may be as injurious as one made in directing the production of written instruments of evidence, but certainly in such a case there can be no appeal until after final judgment. So, an error may be committed in compelling the disclosure of confidential communications, or in compelling a party to submit to a personal examination, and yet there can be no appeal from such a ruling. So, also, great hardship may arise from erroneously compelling a party to produce a letter, a receipt, a promissory note, a lease or a deed, but the hardship of the case will not entitle the party to an appeal. On the other hand, to allow appeals from such rulings before final judgment, would be a great hardship to the party rightfully demanding the production of the instrument; it would also be a great injustice to the public and a burden to the courts, for it would enable litigants to take many appeals in a single cause. It is safer to trust the trial judge than the interested parties. It is consistent with experience and in harmony with sound principle to trust to the judge rather than to the parties having important interests at stake and often angered by controversy. It is far better to presume that the judge will not unjustly require the production of a written document, than to presume that a party will not abuse the right of appeal."

This language was used in reference to the right of appeal in that case, but it is particularly applicable here, and clearly expresses our ideas upon the subject in hand. We are of the opinion, therefore, that certiorari will not lie to review the order complained of, because the relators have a remedy by appeal from the final judgment in the case, where any errors made by the trial court relating to the sufficiency

of the complaint or the showing for the order of inspection or the admissibility of the books and papers as evidence may be reviewed.

The motion to quash is therefore sustained.

RUDKIN, C. J., CROW, PARKER, and DUNBAR, JJ., concur.

[No. 8175. Department Two. January 12, 1910.]

THE STATE OF WASHINGTON, *on the Relation of the City of Port Angeles, Appellant*, v. D. W. MORSE, *Respondent*.¹

QUO WARRANTO—MOTION TO QUASH—DEMURRER. A motion to quash a quo warranto, upon the ground that the information did not state sufficient facts to entitle the relator to the relief prayed, may properly be treated as a demurrer to the information.

MUNICIPAL CORPORATIONS—ORDINANCES—FRANCHISES — WHARVES. An ordinance granting a franchise to maintain a wharf commencing at the foot of a street and extending along the line of the street extended into tide water, is not a franchise to use a public street.

MUNICIPAL CORPORATIONS—CHARTER—POWERS—FRANCHISES. Bal. Code, § 938, authorizing cities of the third class to sell, dispose of or rent "water front" refers only to water front property to which the city has title, and not to water front of which it has control as a public street.

MUNICIPAL CORPORATIONS—ORDINANCES—FRANCHISES — LEASE — REMEDIES—QUO WARRANTO. An ordinance purporting to grant a franchise to maintain a wharf on city water front property for a term of years, reserving rent and right of reentry, is a lease and not a franchise, and the remedy of the city for nonpayment of rent is by an ordinary action, and not by quo warranto for usurpation of a franchise.

WHARVES—RIGHT TO MAINTAIN—MUNICIPAL CORPORATIONS—TIDE LANDS. The territorial act, Bal. Code, § 4077, providing that cities may authorize the construction of a wharf at the terminus of a street, has been superseded by Const., art. 15, and the laws enacted in pursuance thereof for the sale, lease or control of tide lands and harbor areas by agents of the state, so far as the same affects tide lands not owned by the city or included in public streets extended over the tide lands.

¹Reported in 106 Pac. 147.

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Appeal from a judgment of the superior court for Clallam county, Still, J., entered April 16, 1909, dismissing a quo warranto proceeding, upon sustaining a demurrer to the information. Affirmed.

Geo. Venable Smith, for appellant.

J. E. Cochran, for respondent.

PARKER, J.—This proceeding was instituted in the name of the state, by information in the nature of quo warranto, wherein it is alleged, in substance, that the proceeding is instituted by authority of a resolution of the city council of the city of Port Angeles; that the respondent holds and exercises a certain franchise, granted to him by said city by an ordinance which, so far as necessary for us to notice its terms, is as follows:

“Ordinance No. 353.

“An ordinance granting to D. W. Morse and his assigns, the right to construct and maintain a wharf at the foot of Laurel street in the city of Port Angeles.

“The city council of the city of Port Angeles do ordain as follows:

“Section 1. That there is hereby granted to D. W. Morse and his assigns the right to construct and maintain a wharf at the foot of Laurel street in the city of Port Angeles, for a period of ten years, from and after the 12th day of May, 1907.

“Section 2. That said wharf shall commence at the foot of Laurel street and extend northerly into the Port Angeles Bay, along the line of said Laurel street, extended, from the foot of Laurel street to “T” of present dock, and shall be at least twenty-six feet wide, along said line of Laurel street, extended.

“Section 3. That said wharf and its approaches shall be constructed and maintained in a substantial and good workmanlike manner, and may be subject to inspection and approval of the civil engineer of the city of Port Angeles.

“Section 4. That said grantee and his assigns shall have the right to receive and collect, only such rates for wharfage, storage and dockage as the city council of said city may,

from time to time, establish, and said wharf shall be subject to the laws of the state of Washington, and to the ordinances of said city, regulating wharves.

"Section 5. That this ordinance shall not be construed to take any of the rights of the public to the use of Laurel street or to said wharf, as a public highway.

"Section 6. This franchise is granted upon the further conditions and considerations, to wit:

"*Third.* That said grantee or his assigns pay to city of Port Angeles the sum of ten dollars per month, for each and every month, during the term of said franchise, for the use of said dock and for the rights and privileges herein granted, payable monthly. . . .

"Section 6. Should said D. W. Morse, or his assigns fail to comply with any or all of the conditions of this ordinance, then and thereupon this ordinance shall become null and void, and all the rights and franchises herein granted shall become forfeited.

"Section 7. This ordinance shall take effect and be in force from and after its passage, approval, the filing of the acceptance of the same by said grantee, and from and after five days after its publication."

that on July 13, 1907, respondent duly accepted said ordinance with the rights and privileges therein mentioned and subject to the terms and conditions therein expressed, and in and by virtue thereof took possession of the water front therein mentioned, and has ever since used the same for the business of a wharf, collecting and retaining all fees, tolls and emoluments thereof; that respondent having failed to pay any of the monthly rental due the city under said ordinance, the city notified him on February 17, 1909, that unless he paid the same within five days, action would be brought to collect the same and for judgment ousting him from said wharf privileges and enjoining him from exercising said privileges; that defendant thereupon refused to pay said rent, and denied the right of the city to collect the same, and denied the right of the city to interfere with his possession of said wharf and his right to maintain the same. The prayer is, in substance, for judgment forfeiting all of

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respondent's rights granted under said ordinance; that he be enjoined from exercising the same; that he be ousted from the possession of said wharf; and that judgment be given relator for damages against defendant equal in amount to the rent unpaid.

The respondent moved to quash the information upon the ground:

"That the purported information does not set forth facts constituting either an intrusion into or usurpation of any public office; or unlawful holding or exercise of any public franchise.

"That the facts alleged in the information constitute, if any, cause of action, only upon civil contract between the city of Port Angeles, one party and D. W. Morse, an individual, the other party thereto; or for unliquidated damages; to which in either case the state of Washington is not a proper party; and in which the state has no interest or concern, and for which the law affords full and adequate relief to each party without the intervention of this or any other extraordinary remedy."

Other causes assigned in the motion we need not notice. The trial court evidently treated the motion as a demurrer, and upon the hearing thereof, the same was sustained; and the relator electing to stand upon its information and declining to amend the same, judgment was entered dismissing the cause, from which this appeal is prosecuted.

It is first contended by learned counsel for the relator that the motion to quash was not a proper method of testing the sufficiency of the information. We think, however, in view of the grounds stated in the motion, challenging the sufficiency of the information to entitle the state to the relief prayed for, it was in effect a demurrer, and put in issue the question of law as to whether or not the facts pleaded would warrant the relief prayed for. *State ex rel. Attorney General v. Seattle Gas & Elec. Co.*, 28 Wash. 488, 68 Pac. 946, 70 Pac. 114.

The right to institute and maintain this proceeding in the

name of the state is based upon subdivision 1, of § 5780 of Ballinger's Code, which provides:

"An information may be filed against any person or corporation in the following cases:

"(1) When any person shall usurp, intrude upon (into), or unlawfully hold or exercise any public office or franchise within the state, or any office in any corporation created by the authority of the state."

And the principal question presented is, Do the acts which the information charge as being done by respondent constitute an unlawful holding or exercising of any public franchise? This necessitates an inquiry into the nature of the relation of the respondent to the city, and the nature of the city's rights in or control over the land upon which respondent is maintaining the wharf in question. The facts alleged in this information, it seems to us, negative the fact that this wharf is being maintained upon a public street. Section 2 of the ordinance clearly indicates that it is located beyond the end of Laurel street, upon the line of the street extended into the bay. It is true that section 5 seems to reserve some right in the public to use the wharf as a public highway, but that does not show that the city holds or has the right to control the ground upon which the wharf is located, as a public street. Therefore the acts charged against respondent do not appear to be a holding of a public franchise to use a public street.

Learned counsel for relator contends that subdivision 2 of § 938 of Ballinger's Code gives the city power to grant the rights here being exercised by respondent. That section, being a part of the charter of cities of the third class, to which relator belongs, provides:

"The city council of such city shall have power,— . . .
(2) To purchase, lease or receive such real estate and personal property as may be necessary or proper for municipal purposes, . . . to control, dispose of and convey the same for the benefit of the city: Provided, that they shall not have the power to sell or convey any portion of any water front,

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but may rent such water front for a term not exceeding ten years. . . . ”

It seems to us this must refer only to such water front property as the city has title to, and not to such as it has control of only as public streets. It hardly needs citation of authority to show that the state would have no interest in a controversy between a city and one of its tenants upon land held by the city in this manner. The relation of the city and such a party would simply be that of landlord and tenant, and of course their respective rights involved in dispute would be a matter of private litigation between them in which the state would not be a proper party. 17 Ency. Plead. & Prac., 404. If then, the city holds this land so it may rent the same under the provision of section 938, and the respondent is wrongfully in possession thereof by reason of the forfeiture of his rights under this ordinance or otherwise, let the city sue to recover its property in its own name as any other person or corporation may do. A leasing or renting of property by a city, cannot be converted into a public franchise by merely calling it such in the writing which may evidence such leasing or renting. If this ordinance granting the use of this wharf location was under section 938, it was not the granting of a public franchise, any more than the renting of any other land the city happens to own would be.

It is also contended that warrant for the city's power in the passage of this ordinance can be found in § 4077, of Ballinger's Code, which provides:

“Whenever any person or persons shall be desirous of erecting a wharf at the terminus of any street of any incorporated town or city in the state, he or they may apply to the municipal authorities of such town or city, who, if they shall be satisfied that the public convenience requires said wharf, may authorize the same to be erected and kept in repair for any length of time not exceeding ten years.”

This section, of course, must refer to the terminus of a street which extends to navigable water, or at least to tide

land bordering on navigable water. It was enacted by the territorial legislature long before the admission of the state, and consequently at a time when tide land and harbor area were not subject to private ownership, or to any law providing for their disposition, being held for the future state to dispose of and control as it might see fit, though it may be conceded the territorial legislature could regulate their use prior to statehood. Now, assuming that this wharf is outside the limits of a platted and dedicated street, as we have seen the information indicates; and assuming that the wharf is upon either tide land or harbor area or both, it at once becomes evident that whatever right the city has to control the use of such land or harbor area must be derived from the state, under article 15 of the constitution, and laws enacted in pursuance thereof. We can see three possible ways in which the city might have acquired control over this land and harbor area. First, the city might have extended its streets over such lands, or the same might have been platted and dedicated as a street by the state, as provided by § 3, article 15 of the constitution, and the laws enacted in pursuance thereof providing the manner of doing so. As we have seen, this information negatives the idea of either of these having been done. So the city would have no control over the land or area, as a public street, upon which the wharf is located. *State ex rel. Gatzert-Schwabacher Land Co. v. Bridges*, 19 Wash. 428, 53 Pac. 547. Second, the city may have acquired control over the tide land by purchase or lease. Third, the city may have acquired control over the harbor area by lease. Our attention has not been directed to any law enacted in pursuance of article 15 of the constitution providing any different means of acquiring control over these lands and areas by cities. The Laws of 1895, p. 527, Laws of 1897, p. 229, and Laws of 1899, p. 225, have prescribed the manner of disposition of these lands and areas in one or the other of these ways, by the agents of the state. Section 4077, above

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quoted, enacted by the territorial legislature, it is argued, is not inconsistent with the laws regulating the disposition and lease of tide land and harbor area, enacted since the adoption of the constitution. We think it is inconsistent with, and is superseded by, such laws, in so far as it assumed to give to cities the right to control the use of land or harbor area outside the limits of a platted or dedicated public street. Whether or not it is in force so as to empower a city to grant such a use of land *within a street*, as this ordinance purports to grant, we need not now determine; neither need we determine whether such a grant within a street would be the grant of a public franchise.

We are then led to the conclusion that whatever right of control the city may have over the land and area upon which this wharf is located it is not that control which is incident to a public street. Its rights and powers can in no event be other than that of purchaser or lessee from the state, in which event its ownership or control would be the same as that of any other person or corporation holding by such purchase or lease. In other words, it would be private property of the city, with only such restrictions upon its use as any other owner or lessee would be subject to. This being the case, it follows as we have indicated, that the acts charged as being done by respondent do not constitute the unlawful holding or exercising of a public franchise. If such acts in any way invade the rights of the relator, they become nothing more than the subject of private litigation between them, in which the state has no concern; and hence the matters here sought to be drawn in controversy cannot be litigated in the name of the state as plaintiff.

We conclude that the learned trial court committed no error in dismissing the cause, and its judgment is therefore affirmed.

RUDKIN, C. J., DUNBAR, CROW, and MOUNT, JJ., concur.

[No. 7830. Department Two. January 13, 1910.]

LEWIS J. KNAPP, *Respondent*, v. NORTHERN PACIFIC
RAILWAY COMPANY, *Appellant*.¹

CARRIERS—NEGLIGENCE—SETTING DOWN PASSENGERS — EVIDENCE—SUFFICIENCY. Negligence in putting an intoxicated passenger off at his station while the train was moving is not shown where it merely appears from his testimony that he became intoxicated on the train and was awakened at his station and some one pushed him off the train; there being nothing but speculation or conjecture to connect the trainmen with the affair, and they having denied putting him off or any knowledge of how he got off.

Appeal from a judgment of the superior court for Yakima county, Preble, J., entered May 12, 1908, upon the verdict of a jury rendered in favor of the plaintiff, in an action for personal injuries sustained by a passenger alighting from a train. Reversed.

Geo. T. Reid and *Englehart & Rigg*, for appellant.

H. J. Snively and *William M. Thompson*, for respondent.

PARKER, J.—This is an action to recover damages for personal injuries, alleged to have resulted to plaintiff from the negligence of the railway company in putting plaintiff off its train, while he was in a state of intoxication and while the train was in motion.

By his complaint, plaintiff alleges, in substance, that on April 19, 1907, he became a passenger on defendant's train, at North Yakima, to go to the station of Mabton; that he became intoxicated upon the train to an extent that he was not able to know what he was doing, which the officers and employees in charge of the train knew or could have ascertained by casual and ordinary inspection; that he went to sleep prior to reaching Mabton, and was asleep and intoxicated and was not aware that he had reached that station upon the train's arriving there; that when the train

¹Reported in 106 Pac. 190.

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pulled out of that station, one or more of the employees or officers in charge of the train awakened him and took and accompanied him to the platform of the car, while the train was running, he still being intoxicated and not conscious of what he was doing, or the risk he was taking, or the fact that the train was moving, so carelessly and negligently put and assisted him off the train, and so carelessly and negligently permitted and advised him to alight therefrom in his intoxicated condition, that he was dashed violently to the ground, and thereby injured. The nature and extent of plaintiff's injuries need not be noticed, since no question arises thereon.

The railway company's answer is, in substance, a denial of the acts of negligence charged against it, with an allegation of plaintiff's own negligence as the cause of whatever injury he sustained; to which allegation plaintiff replied, denying the same. At the conclusion of the trial, before the court and a jury, the defendant moved the court to take the cause from the jury and render judgment in its favor upon the ground that the evidence was not sufficient to submit to the jury the question of its negligence, and that it affirmatively appeared therefrom that the injury to plaintiff was caused by his own negligence and without fault of defendant, which motion was denied, and exception was taken, when the cause was submitted to the jury and a verdict rendered against defendant. Thereafter defendant moved for judgment notwithstanding the verdict upon substantially the same grounds as for judgment at the close of the evidence, which was denied, when exception was taken, and judgment rendered accordingly, from which defendant has appealed.

The only question to be determined is, Was the evidence sufficient to sustain the verdict and judgment? We have carefully read the evidence, all of which is brought here by statement of facts for our review. Let us first notice re-

spondent's own version of his condition, and also how he got off the train.

He says:

"I had been drinking considerable that day. I drank considerable on the train. I remember leaving here (Yakima), and about the last I remember was pulling into Toppenish, . . . and then fell off to sleep. . . . I was drinking most all the way down there. . . . The first thing I remember, there was somebody punched me in the back and I fell on the ground, . . . and looked up and saw the train crew looking at me. . . . I don't know whether there was two or three there. . . . And also there was some people looking out of the window at me."

This, the evidence shows, happened as the train was leaving Mabton, where he was to get off. The evidence is silent as to how fast the train was going, but it evidently had not acquired much speed. A few days after the accident, he signed a written statement, in the presence of three witnesses, apparently freely made, in which he states the facts in substance the same as in his evidence above quoted, except he states therein, "I would not state that I was pushed off the train as I knew nothing until I was laying on the ground, after I went to sleep, but I have witnesses to prove I was pushed off the train." The testimony and written statement above quoted is the substance of plaintiff's whole story, and no version of it can be drawn from the record which is more favorable to his contentions.

The evidence shows that plaintiff was very much under the influence of liquor, but there is no evidence to the effect he was helpless or unable to walk and move about without assistance, save his own statement to the effect he was asleep, and has no memory of what occurred from the time the train left Toppenish until he fell on the ground at Mabton. There is no testimony of any witness who saw any one push or assist him off the train, though some of the witnesses saw him come off, or fall off. One witness said he came off "like he had a big force behind him," but admitted he did not

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know whether any employee had touched respondent or not. This is the nearest any testimony went towards showing respondent was pushed off, assisted off, or urged to get off the train.

There was testimony to the effect that respondent, upon the arrival at Mabton depot, got off and put his blankets down, and then got back on the train again and entered into conversation with a man near the middle of the smoking car, in which respondent had been riding with some fifteen or twenty others in one party coming to Mabton to work on a new railroad grade. In any event, he was in the smoking car and it was from there he went off the train. The porter testified that he saw respondent start to go out of the car as the train was starting, that he told the brakeman, "and we both rushed back to see if he was going to get off, and he was off." The brakeman testified in substance the same. Both testified, neither pushed him off. They did not even see him get off or fall off, though they saw him immediately after, and no other employee was there. There was other testimony to the effect that he started and ran out of the smoking car, and also that he seemed able to take care of himself. The porter and brakeman appeared on the platform immediately after respondent got off or fell off, which accounts for their being seen there at that time by some of the witnesses. This is in substance all the evidence we have in the record showing how respondent got off the train. This makes it purely a matter of speculation and conjecture as to whether the brakeman, porter or any employee of the company, pushed, assisted, or even advised respondent to get off the train while in motion. In order to sustain this verdict we must presume the brakeman and porter were guilty of pushing respondent off the train in his drunken condition, from the mere fact they were present immediately following his falling off. Why not presume they hurriedly followed him out of the smoking car for the purpose of preventing his getting off, in view of the train being

in motion? Why not presume they were attempting to do the right and humane thing rather than to presume they did the inhuman act sought to be attributed to them? But we are not to decide cases upon presumptions outside the realm of the evidence. This is not a question of deciding between conflicting statements in the evidence, except possibly respondent's own conflicting statements to the effect that "there was somebody punched me in the back and I fell to the ground," and "I could not state that I was pushed off," but it is a question of a search in vain, in this record, for any evidence that the brakeman, porter, or any employee on the train had anything to do with respondent's getting off the train. We cannot find support for this verdict save within the field of speculation and conjecture. And as was said in *Gardner v. Porter*, 45 Wash. 158, 88 Pac. 121, "We have frequently held that such a field is not a proper one for the jury." *Peterson v. Union Iron Works*, 48 Wash. 505, 93 Pac. 1077.

We are of the opinion that the learned trial court erred in its disposition of the cause. The judgment is reversed with instructions to grant appellant's motion for judgment notwithstanding the verdict.

RUDKIN, C. J., DUNBAR, CROW, and MOUNT, JJ., concur.

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Opinion Per Curiam.

[No. 8021. Department Two. January 13, 1910.]

MICHAEL J. BYRNE, *Appellant*, v. SPOKANE & INLAND
RAILWAY COMPANY, *Respondent*.¹

RAILROADS—INJURY TO STOCK—CATTLE GUARDS—EVIDENCE—SUFFICIENCY. In an action against a railroad company for killing a horse on or near a private farm crossing, the evidence is insufficient to show that the horse was killed on the right of way or through negligence in maintaining insufficient cattle guards, where no one saw the accident, there had been horses on the right of way the day before, and the horse was found the next morning about 100 yards from the crossing lying down in a field with a broken leg, and the only evidence indicating that the horse had been on the right of way consisted of the fact that there were tracks there as of a horse running for a considerable distance to within a few feet of the cattle guard, and indications that a horse had fallen on the crossing near the track; as such facts are consistent with the theory that it was struck on the crossing.

Appeal from a judgment of the superior court for Whitman county, Sullivan, J., entered October 1, 1908, upon granting a nonsuit, after a trial before the court and a jury, in an action of tort. Affirmed.

R. L. McCroskey (*J. M. McCroskey*, of counsel), for appellant.

Graves, Kizer & Graves, for respondent.

PER CURIAM.—By this action the plaintiff seeks to recover from the defendant railway company damages alleged to have been caused by the negligence of the company in so injuring one of his horses that it had to be killed. The particular negligence relied upon by plaintiff was the alleged insufficiency of the cattle guards, maintained by the company at a private crossing upon the railway right of way where it passed through plaintiff's land, thus allowing the horse to go upon the right of way, where plaintiff alleges it was fatally injured. Upon a trial before the court and a

¹Reported in 106 Pac. 191.

jury, at the close of plaintiff's evidence, the court granted defendant's motion for a nonsuit upon the ground that there was not sufficient evidence to support the conclusion that the horse was injured while upon the company's right of way. Judgment was entered in favor of the defendant accordingly. Motion for new trial was thereafter made, and by the court denied, and thereupon plaintiff appealed to this court.

The only question arising upon this appeal is as to the sufficiency of the evidence to require the submission of the cause to the jury; and this is narrowed to the single question of whether or not the evidence was sufficient to support a finding that the horse was injured while upon the company's right of way, it being conceded that if the horse was injured while upon the crossing the company would not be liable, the alleged negligence relied upon being that the company maintained insufficient cattle guards to keep stock off its right of way.

The evidence shows that the appellant is the owner of land through which the railway runs; he having granted to the company the right of way therefor with an agreement that the company would maintain an open grade crossing, with cattle guards on either side thereof, so that appellant's stock could go and come freely from one side of the track to the other, the fields being fenced on either side and connected by the crossing so that they were, for practical purposes, one enclosure. A considerable number of appellant's horses and cattle were being kept in these fields free to pass from one to the other over the railroad at this crossing, including the horse in question. The horse was injured on the afternoon or night of August 7, 1907. No witness was produced who saw the accident. The horse was found about 7 o'clock on the morning of August 8th, about 100 yards from the crossing, in the field, lying down with one of its legs broken, and otherwise injured, indicating that it had been struck upon the hip. The cattle guards were apparently not very effective in keeping the horses off the right of way. They

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had frequently gone upon the right of way over the cattle guards, and had been driven therefrom over the cattle guards. Several of the horses were upon the right of way that night, and had been at other times shortly previous. The evidence relied upon to show that the horse was injured while upon the right of way was that of a witness who testifies in substance, that on August 8th he saw tracks of a horse which had evidently been running on the company's right of way for a considerable distance parallel with the track and toward the cattle guard at the crossing, which tracks approached to within three to five feet of the cattle guard, and that, at a point on the crossing near the track and within a short distance of the cattle guard, there was a place upon the ground indicating where a horse had fallen, this place being between the cattle guards and where appellant's stock would pass over in going from one field to the other. The cattle guards on either side of the crossing were approximately thirty feet apart. This is the substance of the facts relied upon in support of appellant's contention that the horse was struck and fatally injured while upon the right of way. A more detailed statement, we think, would not show the facts any more favorable to appellant's contentions.

Counsel's theory seems to be that the facts warrant the conclusion that the horse was struck while upon the right of way and knocked out upon the crossing to the side of the track between the cattle guards. It seems to us that the learned trial judge was clearly right in his conclusion that these facts would not support a finding to the effect that the horse was injured while upon the right of way, or while in the act of attempting to go over the cattle guards. These facts are no more consistent with such a theory than with the theory that it was injured while standing upon or passing over the track from one field to the other between the cattle guards. We are of the opinion that the learned trial judge correctly disposed of the case in sustaining respondent's motion for nonsuit rather than submitting the case to the jury

to speculate between these two theories, the latter of which has as much support in the evidence as the former. *Knapp v. Northern Pac. R. Co.*, ante p. 662, 106 Pac. 190. The judgment is affirmed.

[No. 8340. Department Two. January 13, 1910.]

THE STATE OF WASHINGTON, *Respondent*, v.
FRANK CARPENTER, *Appellant*.¹

CRIMINAL LAW—TRIAL—WITNESSES—INDORSEMENT. In the absence of any showing of prejudice, it is not reversible error to allow at the trial the indorsement of the name of a witness upon the information and permit him to testify.

CRIMINAL LAW — CONTINUANCE — INDORSEMENT OF WITNESS AT TRIAL. The defendant is not entitled to a continuance, as a matter of right, upon allowing the state to indorse the name of a witness on the information at the trial, where no showing is made of prejudice to defendant's rights.

Appeal from a judgment of the superior court for Spokane county, Kennan, J., entered February 28, 1909, upon a trial and conviction of robbery. Affirmed.

A. H. Gregg and *P. R. Heily*, for appellant.

Fred C. Pugh and *Donald F. Kizer* (*A. J. Laughon*, of counsel), for respondent.

PARKER, J.—The appellant was charged with the crime of robbery, and upon a trial before the court and a jury, was found guilty. He moved for a new trial, which motion was denied, and exceptions noted, when judgment and sentence was pronounced against him accordingly. He thereupon appealed to this court, assigning as error the ruling of the trial court in allowing the name of a witness to be indorsed on the information, and in denying appellant's motion for a continuance.

¹Reported in 106 Pac. 206.

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When the case was called for trial, the prosecuting attorney asked that the name of a witness be indorsed on the information, which was by the court permitted over appellant's objection, and the witness was thereafter allowed to testify for the state, also over appellant's objection. Immediately upon the court's permitting the indorsement of the name of the witness upon the information, the attorney for appellant orally moved the court as follows: "We now move the court for a continuance until we can get evidence to meet that of Columbus Craker" (the witness), which motion the court denied. Exceptions were noted to these rulings, and the questions were again brought to the attention of the court upon the motion for new trial. No showing of facts of any nature was made to the court on behalf of appellant for a continuance upon the making of the motion, nor were any facts shown upon the motion for new trial showing any prejudice to appellant's rights by the indorsement of the name of the witness on the information and permitting him to testify for the state, the attorney for appellant relying solely upon the fact of the indorsement being made at the time the case was called for trial, and the further fact, appearing in the record, that the prosecuting attorney must have known of the witness on February 9, some six days before the trial, since a subpoena was then issued for the witness.

It is clear that the first assigned error, that is, the indorsement of the witness' name on the information and allowing him to thereafter testify for the state, was not reversible error, in the absence of any other showing than appears in this record. *State v. Le Pitre*, 54 Wash. 166, 103 Pac. 27.

Counsel's contention upon the other assigned error is that appellant was entitled to a continuance as a matter of right upon the mere fact that the witness' name was indorsed on the information when the case was called for trial. In support of this contention he cites: *State v. John Port Townsend*, 7 Wash. 462, 35 Pac. 367; *State v. Bokien*, 14 Wash.

408, 44 Pac. 889; *State v. Holedger*, 15 Wash. 448, 46 Pac. 652; *State v. Lewis*, 31 Wash. 515, 72 Pac. 121.

It is true there are expressions of the court in these cases indicating that the indorsement of the name of a witness on the information immediately preceding or during the trial with a view of using such witness for the state may entitle the accused to a continuance; but we do not think the rule is thereby established that such indorsement alone entitles the accused to a continuance as a matter of right, to the extent that the trial court would be without discretion in the granting of such continuance. There being no showing of facts, either at the time of the indorsement of the name of the witness on the information or upon the motion for new trial, indicating that the rights of appellant were prejudiced by the use of this witness by the state, we are unable to say that he was thereby prevented having a fair trial, or that the discretion of the trial court was abused. *State v. Quinn*, ante p. 295, 105 Pac. 818.

The judgment is affirmed.

RUDKIN, C. J., DUNBAR, CROW, and MOUNT, JJ., concur.

[No. 8402. Department Two. January 14, 1910.]

THE STATE OF WASHINGTON, *Respondent*, v.
CHARLES GUNDERSON, *Appellant*.¹

BURGLARY—ENTRY—TIME—EVIDENCE—SUFFICIENCY. The evidence is insufficient to warrant a conviction for entering a ship in the nighttime with intent to commit a misdemeanor, where no breaking was alleged and it devolved upon the state to prove entry in the nighttime, and from the evidence the property was not missed until more than two hours after daylight.

EVIDENCE—JUDICIAL NOTICE. The courts take judicial notice that in this latitude in August it is daylight in the morning at 5:30 o'clock.

¹Reported in 106 Pac. 194.

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Opinion Per CROW, J.

Appeal from a judgment of the superior court for Jefferson county, Still, J., entered October 24, 1908, upon a trial and conviction of burglary. Reversed.

Allan Trumbull, for appellant.

Jas. W. B. Scott and *U. D. Gnagey*, for respondent.

CROW, J.—The defendant Charles Gunderson, having been adjudged guilty of burglary, has appealed to this court.

The information which was filed against the appellant and one Fred Hansen, under Bal. Code, § 7104, charges:

“That the said Fred Hansen and Charles Gunderson, then and there being, did on August 11th, 1908, *in the nighttime*, in Jefferson county, Washington, unlawfully and burglariously enter the ship Robert R. Hind, with intent then and there to commit a misdemeanor or felony,”

Appellant has made several assignments of error, but we only find it necessary to consider his contention that his motion for a directed verdict of acquittal should have been sustained. He was charged with entering the ship in the nighttime. No breaking was alleged. It therefore devolved upon the state to show by competent evidence that the alleged entry did occur in the nighttime. The ship was in the sole charge of one John E. Nelson, its master. He testified that certain property had been taken therefrom; that on August 11, he had been ashore from early morning until late in the evening, when he returned to the ship; that he got up about seven-thirty o'clock the next morning to take in the side lights; and that he then found some one had taken the property from the ship. He did not testify that he missed the property, or that he knew it had been taken at any prior time. He was the only person on the ship and the only one who testified to the fact of its having been entered or that the property had been taken. Judicial notice will be taken of the fact that in this latitude during the month of August, it is daylight in the morning for more than two hours before

seven-thirty. There is nothing to show that the entry may not have been made, and the property taken, within those two hours, or during the daytime. The jury were not warranted in finding that the entry had been made in the nighttime.

The appellant's motion for a directed verdict should have been sustained. The judgment is reversed, and the case remanded with instructions to dismiss the action and discharge the appellant.

RUDKIN, C. J., MOUNT, PARKER, and DUNBAR, JJ., concur.

[No. 7669. Department Two. January 14, 1910.]

JOHN HUNTINGTON *et al.*, *Appellants*, v. L. L. LOVE *et al.*,
Respondents.

JOHN HUNTINGTON *et al.*, *Appellants*, v. PACIFIC SECURITY
STORAGE & WAREHOUSE COMPANY, *Respondent*.¹

APPEAL—REVIEW—TRIAL DE NOVO—ERROR ALLEGED BY RESPONDENTS. In an equity case tried *de novo* on appeal, the respondent, having taken exception to findings, is entitled, without having taken a cross-appeal, to have the erroneous findings reviewed and corrected, and the judgment affirmed, if supported by the evidence or right on any ground, although based upon erroneous findings.

INSANITY—EVIDENCE—SUFFICIENCY. The evidence is insufficient to show that one who had been an inmate of an insane asylum for a few months, and at times somewhat deranged, was insane, where it appears that for over three years before the commencement of the action, she had held a responsible position of trust as a housekeeper, and witnesses testified to her complete sanity during such time.

Appeal from a judgment of the superior court for Pierce county, Clifford, J., entered February 25, 1908, upon findings in favor of the defendants, after a trial before the court without a jury, dismissing an action to redeem from tax sales. Affirmed.

¹Reported in 106 Pac. 185.

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Opinion Per CROW, J.

B. W. Coimer, Walter Christian, and P. C. Sullivan, for appellants.

T. W. Hammond, W. H. Doolittle, and S. F. McAnally, for respondents.

CROW, J.—These two actions were commenced by Mary C. Huntington, by Alfred J. Huntington, her guardian *ad litem*, to redeem from tax sales certain real estate in the city of Tacoma. L. L. Love and J. H. Spencer were defendants in one action and the Pacific Security Storage & Warehouse Company, a corporation, was defendant in the other, they being the several holders of the tax titles. As the two actions involved the same issues of fact and law, they were consolidated and tried together. After they had been commenced, John Huntington, husband of Mary C. Huntington, by amendment of the complaint, was made an additional party plaintiff. The trial judge made findings of fact and conclusions of law, on which an order of dismissal was entered. The plaintiffs have appealed.

Mary C. and John Huntington were married in 1879 and thereafter, but prior to 1895, acquired as community property, the real estate involved in this action. The appellants contend that Mary C. Huntington became insane about December, 1895; that she has been insane ever since; that during such insanity, certain state, county, and municipal taxes assessed against the community real estate became delinquent; that about December, 1904, the tax liens were foreclosed; that under such foreclosure proceedings, and by mesne conveyances, the respondents acquired their respective tax titles; that prior to the commencement of this action, tenders of all the delinquent and subsequent taxes, with penalty, interest, and costs were made by appellants to the respondents, and that Mary C. Huntington is now entitled to redeem the property from the tax sales. The regularity of the tax foreclosure proceedings is not questioned, but appellants predicate the right of redemption upon the insanity of Mary C.

Huntington and on Pierce's Code, § 8696 (Laws 1899, p. 298), which in part reads as follows:

"If the real property of any minor heir, or any insane person, be sold for non-payment of taxes or assessments, the same may be redeemed at any time after sale and before the expiration of one year after such disability has been removed upon the terms specified in this section on the payment of interest at the rate of fifteen per cent per annum on the amount for which the same was sold, from and after the date of sale, and in addition the redemptioner shall pay the reasonable value of all improvements made in good faith on the property, less the value of the use thereof, which redemption may be made by themselves or any person in their behalf."

The respondents deny the alleged insanity of Mary C. Huntington, and contest her right to redeem, even if insane. The trial judge found that the real estate was the community property of Mary C. and John Huntington; that the respondents had acquired the tax titles under the foreclosure proceedings; that sufficient tenders had been made to them by the appellants, and

"(4) That theretofore and about the month of December, A. D. 1896, this plaintiff, Mary C. Huntington, became insane, and ever since said time has been, and is now insane.

"(5) That during the insanity of the said Mary C. Huntington and prior to the year 1904, certain state, county and municipal taxes were levied and assessed against the above described premises."

Upon the findings, the trial judge held that Mary C. Huntington was not entitled to redeem, because, during the entire period in controversy, her husband, John Huntington, was of sound mind, and having the management and control of the community property, had neglected to pay the taxes; that the community was not insane, and that the community was not, nor was either member thereof, entitled to redeem, the wife only being insane. The appellants excepted only to the conclusions of law and decree. They now contend that, upon the findings made, a decree for redemption should have been entered in their favor. The respondents filed written

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exceptions to findings 4 and 5, and other findings, contending that they were not supported by the evidence. Although judgment was entered in respondents' favor, they have caused a statement of facts to be prepared and certified in support of their contention that the findings are not sustained by the evidence.

Respondents insist that to make the statute applicable and entitle the appellants to the right of redemption, it must appear (a) that the redemptioner is the owner of the property; (b) that the redemptioner was insane, and (c) that the action has been commenced in time. Discussing the first proposition, they contend that the community (not either spouse) was the owner of the real estate, and that one spouse—especially the wife—cannot redeem when it appears, as in this case, that the husband has at all times been of sound mind; that he had the management and control of the community property, and that he had failed to pay the taxes. Appellants, commenting on these three contentions, say:

“If by the use of the word owner in the first requirement announced by the respondents is meant the technical holder in whose name the legal title to the real estate sought to be redeemed stands, it has no justification under the language of the statute. The word ‘owner’ does not appear in the redemption statute anywhere in relation to the right of redemption. The language of the statute is that real property may be redeemed under the provisions of the act, and when speaking of minor heirs or insane persons it provides that if the real property of any minor, heir or insane person be sold for non-payment of taxes the same may be redeemed at any time after sale and before the expiration of one year after such disability has been removed. The clear intention of the statute is that any one having an interest in real property which has been sold for taxes could, under certain conditions, redeem the same. The things laid down in (b) and (c) as being also necessary we concede to be correct. The court below in its finding expressly held and found that the redemptioner was at all times insane, and, she being insane, there is no question but that the suit was brought in time while she was still insane.”

By reason of the facts which we find, hereinafter stated, it will not be necessary for us to determine whether Mary C. Huntington, if insane, has the right to redeem. We are unable to find that she was insane when the tax foreclosure occurred, or at any time thereafter, prior to the commencement of this action. Assuming, without deciding, that Mary C. Huntington, if insane, had the right to redeem, notwithstanding the fact that her husband was at all times sane, it would necessarily follow that, upon the findings made by the trial court, the judgment entered would have to be reversed. We hold, however, upon the record before us, that the respondents are not concluded by the findings made, they having excepted thereto. All of the evidence has been properly certified to this court in a statement of facts, the cause is before us for trial *do novo*, and it is our duty to examine the entire record and determine whether the evidence sustains the findings to which the respondents have interposed timely and proper exceptions. They were not aggrieved by the final judgment. It was satisfactory to them. They contend it was right, and could not appeal therefrom. If the proper judgment has been entered, it should be sustained, as respondents are entitled to have it affirmed, even though it may have been reached by unsound reasoning.

We have carefully examined and considered the evidence, with the result that we are unable to approve the findings made by the learned trial judge. His findings are not controlling on this court in an equity case, and we are constrained to say that the evidence is not sufficient to support the appellants' contention that Mary C. Huntington was insane at the time of the tax foreclosure proceedings, or at any time thereafter, prior to the commencement of this action. There is evidence that, about December 31, 1895, she was committed to the state hospital for the insane at Steilacoom; that she remained there about twenty-five or thirty days; that she was again committed in 1900; that she was discharged a few months later; and that between these two

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periods it is quite probable that she was at times, and to some extent, deranged. Although we incline to the conclusion that she was, perhaps, sane during the time between her two commitments, and for some time thereafter, we would not, were the investigation of her condition confined to that period alone, interfere with the findings made by the trial judge, the evidence as to that time being in sharp conflict. From the overwhelming weight of the evidence, it satisfactorily appears that, from early in the year 1896 to the date of the trial, excepting perhaps most of the years 1899 and 1900, Mary C. Huntington first provided for and supported herself as a servant or housekeeper in private families in Walla Walla and Tacoma, and had complete charge of all her own business affairs; that thereafter she went to Victoria, B. C., where she first served a little less than one year as housekeeper in the home of one Shakespeare; that Mr. Shakespeare as a witness for appellants gave testimony tending to show her mind to have been somewhat affected while at his house; that early in 1903, she became housekeeper in the home of one J. E. Church, a prominent business man and citizen of Victoria, B. C., where she continued for three and one-half years, and until after the commencement of this action; that while she was there, the tax liens were foreclosed; that Mrs. Church was in feeble health; that she depended on Mrs. Huntington in many ways, reposing great confidence in her; that Mr. and Mrs. Church at times left Victoria, visiting distant points, for different periods, once for about three months; that during this absence they permitted their four children, one less than four years of age and all under fourteen, to remain in their home in the custody and control of Mrs. Huntington, who cared for them and the home; that affidavits of Mr. and Mrs. Church, one Dr. Helmckeman, a practicing physician, and seven other witnesses living in Victoria, were by stipulation introduced as evidence; that from each and all of these affidavits it appears that the several witnesses had known Mrs. Huntington during the three and a half years she was

housekeeper in the Church home; that they had frequently conversed with her and observed her condition; that they had abundant opportunities for judging her soundness of mind and her intelligence regarding the ordinary affairs of life; that in their opinion she was mentally sound, and that she was capable of transacting any business in which she might have an interest. In addition to this evidence, an attorney and a physician of Tacoma visited her in the Church home, consulted with her in the presence of Mr. Church in regard to this litigation, and had her execute certain papers relative thereto. They testified in a most convincing manner to her competency, her complete sanity, her excellent memory, her rational appearance, and her ability to intelligently understand and transact business. Appellants failed to introduce the evidence of a single witness from the city of Victoria to show the mental condition of Mary C. Huntington during the three and one-half years she lived at the Church home. They had ample time to look up such evidence covering the period mentioned, to take depositions of any witnesses they might find, and to do so after they knew of the evidence obtained by respondents. Although it is true that during the period named her husband and son made her one or two short visits in Victoria; that she made one or two like visits in Tacoma; that her husband and son and certain other witnesses who met her during her brief visits in Tacoma, have given some evidence tending to question her sanity on those occasions, we think their evidence is successfully contradicted by other witnesses living in Tacoma who met her while there, and that at best the testimony either way covers but a few days' time. The evidence of her son and husband is that, in their opinion, she was in much better mental condition when absent from home and working for herself than she was when living with the family. The record also shows that the relations between herself and her husband and sons were not cordial or harmonious. No good purpose could be served by going further into the facts shown, although many additional and con-

vincing facts could be mentioned. It will be sufficient to state that we are unable to find any evidence in the record sufficient to show a condition of insanity on the part of Mrs. Huntington at any time during the three years and a half immediately prior to the commencement of this action, which period included the date of the foreclosure of the tax liens. This being true, it necessarily follows that all rights of Mary C. Huntington were barred by the foreclosure proceedings, and that she is not entitled to redeem.

The proper judgment has been entered, and the respondents are entitled to have it affirmed. It is so ordered.

RUDKIN, C. J., MOUNT, PARKER, and DUNBAR, JJ., concur.

[No. 8376. Department One. January 14, 1910.]

PORT BLAKELY MILL COMPANY *et al.*, *Respondents*, v.
SPRINGFIELD FIRE AND MARINE INSURANCE COMPANY,
Appellant.¹

INSURANCE—FIRE INSURANCE—POLICY—WARRANTIES — SPRINKLER SYSTEM. A "sprinkler clause" in a fire insurance policy, providing for an automatic sprinkler system and due diligence in maintaining the same in good working order, is a "warranty" where the rate of premium was approximately fifty per cent less than upon the same risk without the sprinkler system, whether the clause was so denominated or not.

SAME—BREACH OF WARRANTY—EVIDENCE—SUFFICIENCY. There is a breach of warranty in an insurance policy for due diligence in maintaining an automatic sprinkler system in a sawmill in good working order, where it was disconnected for nearly three weeks while repairs were being made, and it appears that it was a work of only a few hours to disconnect the system from its old location and move it to its new one.

SAME—BREACH OF WARRANTY—EFFECT. The breach of a warranty in a fire insurance policy to use diligence in maintaining a sprinkler system in good working order, avoids the policy at the time of the

¹Reported in 106 Pac. 194.

breach, and it is immaterial that the system was in good working order at the time of the fire and that the breach did not contribute to the loss.

FULLERTON, J., dissents.

Appeal from a judgment of the superior court for Kitsap county, Yakey, J., entered May 5, 1909, upon findings in favor of the plaintiffs, after a trial before the court without a jury, in an action on a fire insurance policy. Reversed.

H. T. Granger and Hughes, McMicken, Dovell & Ramsey, for appellant.

Hastings & Stedman, Walter S. Fulton, C. D. Sutton, and Titus & Creed, for respondents.

MORRIS, J.—Action upon a fire insurance policy written by appellant, insuring the property of the mill company against loss by fire in the sum of \$10,000, with loss, if any, payable to The Detroit Trust Company. The policy was in the usual form, except that it had attached to it a rider containing a description of the property insured, and various special agreements with reference to the particular risk. On April 22, 1907, a fire occurred, whereby a portion of the insured property was damaged. The appellant contending that the policy had been avoided by the failure of the mill company to observe one of the special agreements, claimed to be a “warranty,” denied its liability, and this action was instituted to enforce payment, resulting in findings in favor of respondents, and a judgment in the sum of \$6,452.90, with interest from July 15, 1907, from which this appeal was taken.

Three contentions are made by appellant, upon which we are asked to reverse the judgment.

(1) That The Detroit Trust Company may not maintain an action within this state, not having paid an annual license fee nor otherwise complied with the provisions of our laws in regard to foreign corporations doing business within this state.

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(2) That the policy was avoided by the breach of a warranty therein contained.

(3) That an automatic sprinkler system connected with the mill plant was not in working order at the time of the fire.

Each of these contentions has been considered, but having reached a conclusion upon the second which is determinative of the appeal, we will not discuss the first and third. The clause in the policy which suggests the second assignment of error is as follows:

“Warranted by the insured that due diligence be used that the automatic sprinkler system shall at all times be maintained in good working order.”

The Port Blakely Mill Company was what is known in insurance circles as “a sprinkler risk,” and the evidence discloses that the rate of premium upon “a sprinkler risk” was approximately fifty per cent less than upon the same mill without the sprinkler attachment. So that, by the maintenance of the sprinkler system and the insertion in the policy of the clause above referred to, the mill company obtained this policy upon the payment of \$229 premium, which otherwise would have cost it approximately \$458. It is apparent, therefore, that both parties had fully in mind at the time of the issuance of the policy the advantages that would result to each because of the existence of the sprinkler system and the use of due diligence on the part of the insured to maintain it in good working order at all times. To the insured it meant a saving of \$229 on the premium paid; to the insurer it meant a lessening of its risk, ample consideration to each why this particular form of policy should be chosen and the sprinkler clause made a part thereof; and having in mind this situation, it is not unreasonable to assume that the words used in the sprinkler clause were employed by both parties with a full undertaking that it was a statement and assumption of condition and understanding on the part of

the insured relating to the risk and affecting its character and extent.

While, as is said by Shaw, C. J., in *Daniels v. Hudson River Fire Ins. Co.*, 12 Cush. 416, 59 Am. Dec. 192, at page 423, "There is undoubtedly some difficulty in determining by any simple and certain test what propositions in a contract of insurance constitute warranties"; and conceding the leaning of the courts, in order to protect the insured and avoid a forfeiture, is to hold agreements and stipulations in the policy to be representations rather than warranties in all cases where there is any room for construction, it has nevertheless become fixed and settled, except in so far as it may have been changed and modified by statute in some of the states, that all statements regarding the risk contained in or appearing on the face of the policy are warranties. Cooley's *Briefs on the Law of Insurance*, p. 1133. And such is the rule irrespective of the use of the word "warranty" or "warranted." *Redman v. Hartford Fire Ins. Co.*, 47 Wis. 89, 1 N. W. 393, 32 Am. Rep. 751; *Wood v. Hartford Fire Ins. Co.*, 13 Conn. 533, 35 Am. Dec. 92; *Moulor v. American Life Ins. Co.*, 111 U. S. 335; *Barnard v. Faber*, L. R. 1 Q. B. (1893) 340.

Wood on Fire Insurance, at page 449, says:

"The rule seems to be that such representations in, or a part of the policy, are construed to be warranties when it appears to the court that they have had, in themselves, or in the view of the parties, a tendency to induce the company to enter into the contract on terms more favorable to the insured, than without them. . . . Any statement or description, of any undertaking on the part of the assured, on the face of the policy, which relates to the risk, is a warranty, an express warranty. . . . It is not necessary that it should be stated to be a warranty, or that it should be so by construction. It is enough that it appears upon the face of the policy and relates to the risk."

The case before us would undoubtedly fall within such a rule as Mr. Wood refers to, when it appears that the pre-

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mium on this policy upon a "sprinkler risk" and with the sprinkler clause added was reduced approximately fifty per cent of what it would have been otherwise. This was certainly, in his language, "a tendency to induce the company to enter into the contract on terms more favorable to the insured than without them." In *Wood v. Hartford Fire Ins. Co.*, *supra*, at page 544, the court says:

"The general rule in regard to what constitutes a warranty, in a contract of insurance, is well settled. Any statement or description or any undertaking on the part of the insured, on the face of the policy, which relates to the risk, is a warranty. . . . When it is once ascertained, that it relates to the risk, and was inserted in reference to that, it must be strictly observed, and kept, or the insurance is void."

To our minds the conclusion, both upon reason and authority, is that the clause in question was and is a warranty.

Having reached this conclusion, there is but one other question to be considered, Was there a breach of this warranty? It is undisputed that, from April 1 to April 21, the sprinkler system in what was known in the mill as "No. 3" was disconnected. The fire occurred on April 22, and there is a sharp conflict in the testimony as to whether or not No. 3 was in operation at the time of the fire. But, giving due weight to the finding of the court below that it was connected up on April 21, there was a period of nearly three weeks when it is admitted that no protection was afforded by the sprinkler system in No. 3. The repairs undertaken by the mill during this time were permissible under the policy, but it appears that it was the work of only a few hours to disconnect system No. 3 from its old location and move it to its new. Such being the fact it was not "due diligence," as called for in the policy, for the mill company to continue the operation of the mill without the protection of sprinkler system No. 3. It was an undoubted and material increase in the risk, contrary to the terms of the warranty, and was a breach thereof. The mill company, having broken its contract of

warranty by the failure to use due diligence in maintaining the sprinkler system at all times in good working order, by such failure released the appellant from liability under the policy, and the same thereby was avoided. So that, whether or not the system in No. 3 was in good working order on April 22 is immaterial, since the policy, because of the breach of the warranty, was not then in force or effect. And it was likewise immaterial whether or not this breach contributed to the loss. The policy, being at an end because of its broken warranty, no longer covered any loss or damage to the mill property, and was wholly avoided.

That such is the effect of a broken warranty in a policy of fire insurance there can no longer be any doubt. The principle has been so oft asserted and so frequently announced by both courts and text-writers that it must be regarded as settled. May on Insurance, § 156, thus states the rule:

“Whether the fact stated or the act stipulated for be material to the risk or not, is of no consequence, the contract being that the matter is as represented, or shall be as promised; and unless it prove so, whether from fraud, mistake, negligence, or other cause, nor proceeding from the insurer, or the intervention of the law or the act of God, the insured can have no claim.”

Marshall on Insurance, at page 249, states the same rule in this language:

“It is also immaterial to what cause the noncompliance is attributable; for if it be not in fact complied with, though, perhaps for the best of reasons, the policy is void.”

In the case of *McKenzie v. Scottish Union & Nat. Ins. Co.*, 112 Cal. 548, 44 Pac. 922, the supreme court of California, quoting the above rules, adds:

“The foregoing quotation is but the enunciation in brief form of a principle laid down by all the writers on the subject of insurance, and enunciated in the leading cases of this country and England.”

The supreme court of the United States recognizes the rule

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in *Imperial Fire Ins. Co. v. Coos County*, 151 U. S. 452, and says:

"If it appears that the contract has been terminated by the violation on the part of the assured, of its conditions, then there can be no right of recovery."

We have been furnished with a certified copy of the opinion of Judge Whitson in *Port Blakely Mill Co. v. Royal Ins. Co.*, in the circuit court of the United States for the western district of Washington, northern division, lately decided but not yet published, in which that learned judge, in passing upon a similar clause in a policy covering this same risk, has reached a like conclusion to the one here announced.

The judgment is reversed, and the cause remanded with instructions to dismiss.

RUDKIN, C. J., GOSE, and CHADWICK, JJ., concur.

FULLERTON, J., dissents.

[No. 7801. Department One. January 17, 1910.]

J. F. BOHLING, *Trustee, Appellant*, v. CARROLL HENDRON,
Intervener and Respondent.¹

CORPORATIONS—INSOLVENCY—PREFERENCE TO CREDITORS. Findings that a mortgage was given by a corporation after insolvency and is fraudulent as to creditors, are sustained where there was some evidence tending to show that fact and the mortgage covered practically all of its property and was given to a trustee as a preference to secure certain antecedent creditors.

Appeal from a judgment of the superior court for Chelan county, Steiner, J., entered June 2, 1908, upon findings in favor of the intervening receiver of an insolvent corporation, in an action to foreclose a mortgage, after a trial on the merits. Affirmed.

¹Reported in 106 Pac. 205.

Smith & Cole, for appellant.

Aust & Terhune, for respondent.

FULLERTON, J.—The La Rica Consolidated is a mining corporation, owning certain mining properties situated at Blewett, Chelan county, Washington, which it operated to some extent during the years 1902, 1903, and 1904. In the pursuit of its work, it became indebted to divers and sundry persons and corporations, aggregating a large sum of money which it was unable to pay, and on August 15, 1904, executed a mortgage to "J. F. Bohling, as trustee," covering practically all of its property, both real and personal,

"To secure the payment of fifteen thousand dollars (\$15,000) lawful money of the United States, with interest from date until paid, at the rate of eight per cent per annum, according to the tenor of certain debts and obligations owing by the mortgagor to The Washington Trust Company of Seattle, to sundry creditors for supplies furnished mortgagor, and to certain creditors who have advanced money to take up debts of mortgagor."

Subsequently certain other creditors, said not to be included in the list secured by the mortgage, brought actions against the corporation, recovered judgments against it, and procured the appointment of a receiver for its property. The trustee named in the mortgage thereupon began the present action to foreclose the mortgage. In his complaint he alleged that the several items of indebtedness secured by the mortgage had been paid by other persons, who advanced money for that purpose, and he asked that these persons be substituted in lieu of the original creditors and be declared to be beneficiaries under the mortgage to the amounts of their several advancements. The receiver defended against the foreclosure on various grounds, including fraud, want of consideration, and the ground that the corporation was insolvent at the time the mortgage was executed. The trial court held the mortgage void, but upon which of the several grounds

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urged does not appear. A careful examination of the record, however, convinces us that it must be sustained on the last ground stated; namely, that the corporation was insolvent at the time it executed the mortgage. It would serve no useful purpose to review the evidence on which this conclusion is based, but it is found in the correspondence between the several officers of the company before and subsequent to the time the mortgage was issued, the evidence of the witness, Smith, who testified at the trial, and the fact that the court thereafter, without resistance on the part of the corporation, appointed a receiver for it on the ground of insolvency. It may be added, also, that the fact that the mortgage was given to secure antecedent debts wholly is strong evidence of the corporation's straightened financial condition, even if it is not of insolvency itself.

It is hardly necessary to add that a mortgage given by an insolvent corporation which creates a preference right in favor of a part of its creditors to the exclusion of others is void. It was so held in the early case of *Thompson v. Huron Lumber Co.*, 4 Wash. 600, 30 Pac. 741, 31 Pac. 25, and has been adhered to as the settled doctrine of this state ever since.

The judgment appealed from will stand affirmed.

RUDKIN, C. J., CHADWICK, GOSE, and MORRIS, JJ., concur.

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[No. 8041. Department One. January 17, 1910.]

CHARLES McKEAN, *Respondent*, v. FRANK CHAPPELL *et al.*,
Appellants.¹

MASTER AND SERVANT—CONTRIBUTORY NEGLIGENCE—QUESTION FOR JURY. The contributory negligence of the plaintiff, the operator of the rigging for hauling logs from the pond to the mill, is for the jury, where the plaintiff's witnesses were positive that he performed his duties in the proper and customary manner.

APPEAL—REVIEW—VERDICT. The verdict of a jury upon conflicting evidence is conclusive on appeal, when supported by substantial evidence.

MASTER AND SERVANT—INJURY TO SERVANT—PROXIMATE CAUSE. The wet and slippery condition of the floor of a mill about the rigging to haul logs from the pond, which caused the plaintiff to slip and fall, is not the proximate cause of the injury, where in falling his hand struck a stranded wire cable and the wire pierced his glove and carried him around the drum; but the defective condition of the cable was the cause.

Appeal from a judgment of the superior court for Snohomish county, Black, J., entered January 16, 1909, upon the verdict of a jury rendered in favor of the plaintiff, in an action for personal injuries sustained by an employee in a sawmill. Affirmed.

Brownell & Coleman, for appellants.

Willett & Willett and *A. R. Moore*, for respondent.

FULLERTON, J.—This is an appeal from a judgment for personal injuries. The appellants own a lumber mill, and employed the respondent to operate the rigging used for hauling the logs from the mill pond up to the log deck, preparatory to cutting them into lumber. The logs were hauled up a tramway or chute, which extended from the log deck down into the water of the mill pond, by means of a steel cable attached to a drum; the latter being a contrivance in the shape of a large spool fastened between frames placed

¹Reported in 106 Pac. 184.

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at the farther end of the log deck. The drum was connected with the power of the mill by which it could be made to revolve; and by revolving it wound up the cable and thus would draw into the mill logs to which the end of the cable had been fastened. The drum had two connections with the main shaft of the mill, each of which was operated by a lever, and both of which had to be connected in order to cause the drum to revolve, the first known as the friction gear and the other as the clutch.

The day before the accident happened by which the respondent was injured, the cable pulled loose from its fastening on the drum and was fixed by the appellant Peter Chappell. In fixing it, some of the strands of wire of which the cable was composed were broken and the ends were left sticking out. The respondent called the attention of Chappell to these ends, telling him that he did not feel like working around the cable in its then condition, and was told by Chappell that he had then no time to fix it, but would cut off the objectionable part just as soon as he could get around to it. On the next day the respondent attached the cable to a log and proceeded to start the hauling machinery in motion. He first put on the friction gear and then stepped over to close the clutch. The lever to the clutch was laid parallel with the mill floor and some few inches above it, and the clutch was thrown on and off by moving the lever horizontally. After stooping and moving the lever putting the clutch in place, he started to rise, when his feet slipped on some wet bark which had dropped from the logs to the mill floor, and in his endeavor to protect himself from falling, he threw out his hand, striking the cable at a place where the end of a broken wire protruded. The end of the wire pierced his glove and held him fast to the cable, so that he was hauled to the drum and wound around it under the cable. He was carried four times around the drum, breaking one arm and both legs, one of them in two places. For these injuries he sued in this action.

The appellants assign many errors, a number of which we think are concluded against them by the verdict of the jury. For example, it is contended that the respondent was guilty of contributory negligence in that he selected the more dangerous way by which to start the drum revolving, in that he engaged the friction gear first when he should have closed the clutch first; that he failed to remove the refuse from the floor surrounding the clutch lever before attempting to operate it, it being his duty so to do; and that he stood between the lever and the cable when engaging the clutch, whereas he should have stood on the other side of the lever. But whether any of these acts constituted contributory negligence was, under this record, a question for the jury. On each of these questions there was a conflict in the evidence. While the appellants' witnesses testified that the only safe way to operate the drum was to engage the clutch before the friction gear was engaged, that it was his duty to clean up the debris from around the lever, and that it was improper to stand between the cable and the lever when throwing in the clutch, the respondent's witnesses are equally positive that the respondent performed his duties in the customary way, and in the way that he was expected to perform them. As the jury found for the respondent they must have found in his favor on these questions, and, this being so, the questions are concluded against the appellants in so far as this court can be concerned with them. So, likewise, the question whether or not the appellants were partners or that the relation of master and servant otherwise existed between the appellants and the respondent is concluded by the verdict of the jury. There was substantial evidence to support a finding either way, and we have no warrant to interfere. Nor was there error in the order of the court overruling the appellant's challenge to the sufficiency of the evidence to sustain a verdict for the respondent. As we read the record, there was substantial evidence upon all of the issues on which the respondent had the

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burden of proof. Its probative value was therefore for the jury.

The next assignment is the contention that the proximate cause of the injury to the respondent was the wet and slippery refuse on the mill floor, and not the stranded condition of the cable, and it is argued that since the respondent assumed the risk of injury from the slippery refuse he cannot recover for any injury to which it contributed in any degree. But this contention mistakes the rule. The slippery condition of the debris on the floor did not cause the respondent's injury. While it caused him to fall, the fall itself caused him no injury. His injury was due to the stranded condition of the wire cable. It was this that brought him within range of the drum where he was injured. Hence the condition of the cable was the proximate cause of the injury, and not the condition of the accumulated refuse upon the floor. The case of *Hunter v. Washington Pipe etc. Co.*, 43 Wash. 167, 86 Pac. 171, does not support the appellants' contention in this regard. The employee seeking to recover in that case was not injured while in the performance of his duty. He voluntarily went into a place of obvious danger when his incidental duties did not call him there, and it was for that reason it was held that the master was not liable, notwithstanding the master had neglected the statutory duty of placing guards over the cogwheels on which he was injured. Here the respondent was injured while in the direct performance of his duty, on an instrumentality the dangers of which he had directly refused to assume, and which the master had expressly assumed for him. The distinction is obvious.

The remaining assignments relate to the instructions to the jury. But, without examining each objection separately, it is sufficient to say that the instructions were fair as a whole, and could not mislead the jury to the appellants' prejudice.

The judgment is affirmed.

RUDKIN, C. J., CHADWICK, and GOSE, JJ., concur.

[No. 8230. *En Banc*. January 17, 1910.]

THE STATE OF WASHINGTON, *on the Relation of J. L. Harper et al., Plaintiff, v. I. M. Howell, as Secretary of State, Respondent.*¹

CORPORATIONS—ORGANIZATION—RIGHT TO CORPORATE NAME—FORFEITURE—MANDAMUS. Mandamus will not issue to require the secretary of state to strike the name of a corporation from the records for nonpayment of license fees, pursuant to Laws 1907, p. 272, on the application of a new corporation that sought to take the same name, after the first corporation's name had been stricken by mistake pending negotiations for the adjustment of the first corporation's delinquent license fees, which it was making an honest effort to ascertain and pay (Gose, Chadwick, and Fullerton, JJ., dissenting).

Application filed in the supreme court August 20, 1909, for a writ of mandamus to the secretary of state. Denied.

Troy & Sturdevant, for relators.

The Attorney General, for respondent.

PARKER, J.—This is an original application for a writ of mandamus to require the secretary of state to strike from the records of his office the name of the Republic Consolidated Gold Mining Company, a corporation, and give to relators and to a new corporation attempted to be organized by them, the same name, and issue certificate of incorporation and license accordingly.

The statutes applicable to the controversy are the following: Laws of 1903, page 124, provide:

“No corporation shall take the name of a corporation theretofore [heretofore] organized under the laws of this state, nor of any foreign corporation having complied with the laws of this state, nor one so nearly resembling the name of such other corporation as to be misleading. The secretary of state shall refuse to file said articles of incorporation

¹Reported in 106 Pac. 470.

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of any association or corporation violating the provisions of this act.”

Laws of 1907, page 272, provide:

“It shall be the duty of the secretary of state to strike from the records of his office the names of all incorporations which have neglected for a period of two years to pay their annual license fee; and any corporation thereafter organized may take and shall have the exclusive right to use the corporate name of any corporation so stricken from the records.”

The facts shown by the record are as follows: In March, 1899, the Republic Consolidated Gold Mining Company filed its articles of incorporation with the secretary of state and became incorporated under the laws of this state. On June 8, 1909, it was in arrears on account of license fees for the years 1906, 1907, 1908, and 1909, when W. G. C. Lauskail, for it, forwarded to respondent the sum of \$47.50 in payment of its license fees, and requested that if said sum was not sufficient to pay the fees then due, that he be notified of the amount due. On June 16, 1909, respondent acknowledged receipt of the \$47.50 and notified Lauskail by letter that there was due, including the license fee for 1910, an additional sum of \$27.50, which letter was not received by Lauskail. On June 30, 1909, Lauskail again wrote to respondent concerning the license fees. On July 9, 1909, respondent answered stating that after July 1, the penalty of \$2.50 had accrued and it would be necessary to pay an additional sum of \$30 instead of \$27.50. On August 7, 1909, the sum of \$30 was forwarded to respondent in full payment of all fees and penalties due from the corporation.

In the meantime the following facts occurred, as shown by the record upon which relators base their right to the writ: On July 1, 1909, while the matter of the adjustment of delinquent fees of the corporation was pending, the name of the company was, as alleged by the respondent, through mistake and oversight, stricken from the rolls in his office under the law of 1907 above quoted. On July 1, 1909, before the

mistake of striking the corporation's name from the rolls was noticed, the relators, seeking to organize a new corporation of the same name, filed articles of incorporation and paid the necessary fees into the office of respondent; and before the issuing of certificate of incorporation and license for the proposed new corporation, the mistake of striking the name of the old corporation from the record was discovered, and thereupon respondent refused to issue certificates for the new corporation, for the reason there was another corporation of the same name.

Learned counsel for relators contend that, in view of the fact that they had done all acts necessary to entitle them to incorporate in the name proposed, at a time when the old corporation was in default and after its name had been physically stricken from the rolls, their right to incorporate became fixed and vested. There would be force in this argument were it not for the fact that it is apparent the question of the adjustment of the delinquent fees by the old company was then pending and an honest effort being made by the old company to ascertain and pay the amount due. It is true that adjustment was not consummated until after relators had filed their articles and paid their fees, but it had been commenced before the time for striking the name of the old company from the records had arrived and before relators had taken any steps looking to the incorporation of their company, and had been carried on in an apparent honest effort, and to final consummation.

There is another matter, not mentioned in briefs of counsel, yet we deem it worthy of notice. By § 6, p. 272, Laws of 1907, the annual license fee of corporations of this kind is fixed at fifteen dollars per year payable on July 1, so that when respondent accepted from Lauskail, for the company, the \$47.50 and notified him that \$27.50 would pay the balance due including the fee for 1910, which would be due after July 1, it seems plain that there was not two years license fees (\$30) wholly unpaid, nor was it wholly unpaid when relators

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acquired whatever rights they possess, because taking the \$15 due for 1910 from the \$27.50 due there was evidently only \$12.50 of 1909, unpaid. Whether or not it was strictly regular for respondent to receive a fraction of the 1909 license fee, we need not now inquire. It is evident it was received in the best of faith.

The method of depriving a corporation of its name provided by this law, is summary and without notice; and we do not think a corporation should be held to have incurred such a serious loss, by such a summary method, until its failure and neglect is shown beyond all question. We do not think there is such a showing here against this corporation. The respondent was justified, under the circumstances of this case, in refusing to issue certificates of incorporation and license to the proposed new corporation of the same name. This renders it unnecessary to discuss the constitutional questions presented by counsel.

The writ is denied.

RUDKIN, C. J., DUNBAR, CROW, MOUNT, and MORRIS, JJ., concur.

GOSE, J. (dissenting)—I think the statute requiring the secretary of state to strike the name of a defaulting corporation is mandatory. There is no saving clause in the statute. I therefore dissent.

CHADWICK and FULLERTON, JJ., concur with Gose, J.

[No. 8301. Department Two. November 24, 1909.]

W. F. HAYS, *Appellant*, v. TERRENCE O'BRIEN, *as Administrator of the Estate of John Sullivan, Deceased*, and MARIE CARRAU *et al.*,
Respondents.¹

Appeal from an order of the superior court for King county, Yakey, J., entered March 11, 1909, refusing to vacate a judgment, after a hearing before the court. Appeal dismissed.

Henry St. Rayner and *W. F. Hays*, for appellant.

E. M. Carr and *Corwin S. Shank*, for respondents.

PER CURIAM.—This is another appeal from the same case which we were discussing in No. 8302, *Hays v. O'Brien*, ante p. 67, 105 Pac. 162. For the reason that the order complained of is not a determination by the lower court from which an appeal will lie to this court, the motion to dismiss this case will be sustained.

[No. 8466. *En Banc*. December 11, 1909.]

THE STATE OF WASHINGTON, *on the Relation of Tumwater Power & Water Company, Plaintiff*, v. THE SUPERIOR COURT FOR THURSTON COUNTY, *Respondent*.²

Application for a writ of certiorari to review an order of the superior court for Thurston county, Linn, J., entered May 4, 1908, in condemnation proceedings. Denied.

G. C. Israel, *Martin L. Pipes*, *George H. Funk*, and *Frank C. Owings*, for relator.

A. J. Falknor and *Troy & Sturdevant*, for respondent.

PER CURIAM.—The application in this case is based upon the same facts as those in No. 8465, *State ex rel. Tumwater Power & Water Co. v. Superior Court*, ante p. 287, 105 Pac. 815. For the reasons there stated, it must be denied.

¹Reported in 105 Pac. 162.

²Reported in 105 Pac. 816.

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[No. 8314. Department Two. January 8, 1910.]

MINNEAPOLIS STEEL & MACHINERY COMPANY, *Respondent*, v.
AETNA INDEMNITY COMPANY, *Appellant*.¹

Appeal from a judgment of the superior court for Yakima county, Preble, J., entered April 2, 1909, upon findings in favor of the plaintiff, in an action upon the bond of a contractor upon public work, after a trial before the court without a jury. Affirmed.

Peters & Powell and *Wende & Taylor*, for appellant.
Englehart & Rigg, for respondent.

PER CURIAM.—For the reasons stated in *Cascade Lumber Co. v. Aetna Indemnity Co.*, ante p. 503, 106 Pac. 158, the judgment in this case must be affirmed.

¹Reported in 106 Pac. 160.

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36. APPEAL — DECISIONS — REMAND — PROCEEDINGS BELOW—PAYMENTS ADMITTED PENDING APPEAL. Where, on appeal, a case is remanded with directions to enter a judgment of foreclosure upon a certain debt, it was proper, where it was admitted that payments were made pending the appeal, for the court to determine the amount to be credited by reason of such payments, although they might have been credited on the judgment as well as upon the debt before the judgment directed by the mandate. *Bartlett Estate Co. v. Fairhaven Land Co.*..... 434
37. APPEAL—DECISION—EFFECT OF REVERSAL—JUDGMENT—RES JUDICATION. Where there were no findings of fact or bill of exceptions and no trial *de novo*, and judgment against the defendant was reversed for error in awarding plaintiff relief outside the issues, the cause stands for retrial and the decision is not *res judicata*. *Loeper v. Loeper* 647
38. APPEAL—DISMISSAL—DAMAGES ON DISMISSAL. Damages will not be granted because of the taking of an appeal for delay only, under Bal. Code, § 6522, upon confession of a motion to dismiss and failure to prosecute the appeal, where the record is not brought up and there is nothing further to show that the appeal was taken only for delay; it not being the practice to allow other than statutory costs or any special allowance for attendance. *Hallidie Machinery Co. v. Hayden-Coeur d'Alene Irrigation Co.*..... 11

APPLIANCES:

Liability of employer for defects, see MASTER AND SERVANT, 1-3, 8, 11-13.

APPLICATION:

Time for application for writ, see CERTIORARI, 3.
Diligence in application to vacate, see JUDGMENT, 7.
Of payments, see PAYMENT.

ARRAIGNMENT:

See CRIMINAL LAW, 2.

ARSON:

Incompetency of wife to testify against husband, see WITNESSES, 2, 3.

ASSAULT AND BATTERY:

Excessive damages for, see DAMAGES, 3.

1. **ASSAULT AND BATTERY—CIVIL LIABILITY—JURISDICTION—PROOF.** A violent assault and battery is not excused by showing that the difficulty occurred at a public road which plaintiff had closed up and fenced, and was in possession of at the time defendants attempted to use it. *Neilsen v. Hovander*..... 93
2. **SAME—ISSUES AND PROOF—JUSTIFICATION.** In an action for damages for assault and battery, justification by reason of preventing the defendants from using a public road cannot be shown under a general denial. *Neilsen v. Hovander*..... 93

ASSENT:

Necessity for to constitute contract, see CONTRACTS, 1.

ASSESSMENT:

Assessment work on mine, see MINES AND MINERALS, 3, 4.

For public improvements, see MUNICIPAL CORPORATIONS, 6-8.

ASSETS:

Purchase of corporate assets by stockholders of insolvent corporation, see CORPORATIONS, 14.

ASSIGNMENT:

Of lease, see LANDLORD AND TENANT.

ASSUMPTION:

Of risk by employee, see MASTER AND SERVANT, 8, 9, 12.

ATTACHMENT:

1. **ATTACHMENT—DISSOLUTION—BURDEN OF PROOF.** Upon motion to dissolve an attachment, attacking grounds upon which it was issued, the burden of proof is upon the plaintiff to establish one of the grounds by a fair preponderance of the evidence. *Nicholson v. Erickson* 419
2. **SAME—EVIDENCE—SUFFICIENCY.** An attachment, granted on the ground that the defendant was about to convert his property into money and place it beyond the reach of creditors, should be dissolved, where it only appears from the plaintiff's evidence that the defendant had offered to sell the property at a price exceeding what plaintiff considered its value, and was preparing to move, and refused to sell to plaintiff and allow a credit on the amount; the defendant having denied the indebtedness *in toto*; that he refused two offers to sell his outfit at figures less than his price; only moved it a short distance, openly, and he testified he did not intend to sell. *Nicholson v. Erickson*..... 419

ATTACHMENT—CONTINUED.

3. **ATTACHMENT—DISSOLUTION—AFFIDAVITS—SUFFICIENCY.** It is not error to dissolve an attachment issued on the ground that the defendant was about to convert certain real estate into money for the purpose of placing it beyond the reach of his creditors, where the affidavit for attachment was controverted by affidavit that the defendant at no time attempted to sell the property, but desired his creditors to receive the full amount to which they were entitled; as the same sufficiently denies that he was about to convert the same, etc. *Watson v. Shelton*..... 426
4. **ATTACHMENT—WRONGFUL ATTACHMENT—ACTION ON BOND—WAIVER BY REDELIVERY.** Defendant's retaking of attached property upon a redelivery bond, without moving against the writ, waives the right of action for wrongful attachment upon the attachment bond. *Gutter v. Joiner* 202

ATTORNEY AND CLIENT:

Admissibility of evidence in determining reasonable fee, see **BILLS AND NOTES**, 6.

Attorneys' fees as cost, see **COSTS**, 2, 3.

Argument and conduct of counsel at trial in criminal prosecution, see **CRIMINAL LAW**, 18, 19.

Bidding in property at public sale, see **JUDICIAL SALES**, 2.

Allowance of fees in action for slander of title, see **LIBEL AND SLANDER**, 2.

City attorney as purchaser at assessment foreclosure and sale, see **MUNICIPAL CORPORATIONS**, 6, 7.

Argument or conduct of counsel at trial in civil actions, see **TRIAL**, 2.

1. **ATTORNEY AND CLIENT—ACTION FOR SERVICES—EVIDENCE OF EMPLOYMENT—ADMISSIBILITY.** In an action to recover for legal services rendered in an action against defendant and a corporation, upon an issue as to whether the contract of employment included the defense of the action on behalf of the corporation, it is error to exclude defendants' offer in evidence of a complaint in a former action against the defendants, for the same services, which alleged that the plaintiff was employed by the defendants to defend "for them," as claimed by defendants, as it tended to support the defendants' contention that the plaintiffs were not employed to defend for the corporation. *Kiefer v. Lara*..... 43
2. **SAME—INSTRUCTIONS.** In an action to recover for legal services rendered in the defense of an action assailing the title of the defendants, and of their grantee in a warranty deed made by the defendants, in which there was an issue as to whether the defendants had employed the plaintiff to defend the action on behalf of such grantee, it is erroneous and misleading to instruct the jury that a general warranty deed runs with the land and binds the grantor to defend his title or estate, when the defendants were de-

ATTORNEY AND CLIENT—CONTINUED.

fending their title; as such defense would inure to the benefit of the grantee and they were under no obligation to employ counsel for the grantee. *Kiefer v. Lara*..... 43

AUTHORITY:

Of broker, see **BROKERS**, 1.

To perform marriage ceremony, see **MARRIAGE**.

BAILMENT:

Carriage of goods, see **CARRIERS**, 1-5.

Collateral securities, see **PLEDGES**.

BANKS AND BANKING:

Forgery of checks, see **FORGERY**.

BAR:

Laches as bar in equity, see **EQUITY**.

Of action by former adjudication, see **JUDGMENT**, 2-4.

Recovery of money judgment as bar to mandamus, see **MANDAMUS**.

BATTERY:

See **ASSAULT AND BATTERY**.

BILLS AND NOTES:

Notes as consideration for stock subscription, see **CORPORATIONS**, 5.

Forgery of check, see **FORGERY**.

Application of proceeds of foreclosure sale to payment of notes secured by mortgage, see **MORTGAGES**, 10.

Recovery by indorsee of note taken as collateral security, see **PLEDGES**.

1. **BILLS AND NOTES—ACCOMMODATION MAKERS—STATUTES—CONSTRUCTION.** The negotiable instruments act was intended to change the law with reference to the liability of accommodation parties who signed as joint makers of a promissory note. *Bradley Engineering and Manufacturing Co. v. Heyburn*..... 628
2. **SAME—DEFENSES—STATUTES—CONSTRUCTION:** Section 58 of the negotiable instruments act (Laws 1899, p. 351), providing that a note in the hands of any holder other than a holder in due course is subject to the same defenses as if it were nonnegotiable, must be construed in connection with other sections of the act restricting the defenses, and refers only to such defenses as are permitted by the act itself, or such as do not deny the tenor of the bill. *Bradley Engineering and Manufacturing Co. v. Heyburn*..... 628
3. **BILLS AND NOTES—ACCOMMODATION MAKER—DISCHARGE—EXTENSION OF TIME OF DEBTOR.** Under the negotiable instruments act, Laws 1899, p. 346, § 29, defining an accommodation party as one who

BILLS AND NOTES—CONTINUED.

signed as maker and who is made liable notwithstanding notice to a holder for value, and § 60, providing that the maker engages to pay it according to its tenor, and § 192 defining a person "primarily" liable as one who is absolutely required to pay, an accommodation maker of a note is not discharged by an extension of time to the principal debtor, and therefore cannot show by parol that he signed only as surety. *Bradley Engineering and Manufacturing Co. v. Heyburn* 628

4. **SAME—HOLDERS FOR VALUE AND IN DUE COURSE.** Under the negotiable instruments act, a holder for value and a holder in due course are in the same position to challenge any defense based upon a collateral agreement or upon equities existing between the makers by holding up the instrument itself. *Bradley Engineering and Manufacturing Co. v. Heyburn*..... 628
5. **BILLS AND NOTES—ACTIONS—DEMAND—NECESSITY.** Presentment and demand is not a condition precedent to an action upon an ordinary overdue promissory note. *Hillman v. Stanley*..... 320
6. **BILLS AND NOTES—ATTORNEY'S FEES—REASONABLENESS—EVIDENCE—ADMISSIBILITY.** In an action on a promissory note, upon an issue as to a reasonable attorney's fee, it is inadmissible to show that the plaintiff's attorney attended to all of plaintiff's business under an annual retainer and contract for stated fees in each case. *Hillman v. Stanley*..... 320

BONA FIDE PURCHASER:

See **BOUNDARIES**, 3; **PARTY WALLS**, 3.

Of bill or promissory note, see **BILLS AND NOTES**, 2-4.

Of lands, see **VENDOR AND PURCHASER**, 11.

BONDS:

Mandamus to compel sale of bonds, see **MANDAMUS**.

Notice of claim against bond of contractor on public work, see **MECHANICS' LIENS**, 1.

Of irrigation districts, see **WATERS AND WATER COURSES**, 3.

BOOKS OF ACCOUNT:

As evidence, see **EVIDENCE**, 8.

BOOM COMPANIES:

Exercise of power of eminent domain, see **EMINENT DOMAIN**, 4.

BOUNDARIES:

1. **BOUNDARIES—DESCRIPTION—CONFLICTING CALLS.** Where courses and distances are conflicting, there is no invariable rule that one should control the other, or that calls are controlling in their order, if there are other aids in determining the intent of the parties. *Davies v. Wickstrom*..... 154

BOUNDARIES—CONTINUED.

2. **SAME—CONSTRUCTION BY PARTIES.** Where the calls in a description are conflicting, the construction placed thereon by the parties in locating the lines on the ground may be resorted to, and is conclusive as between the parties. *Davies v. Wickstrom*..... 154
3. **SAME—CONSTRUCTION BY PARTIES—NOTICE—BONA FIDE PURCHASER.** The building and maintenance of a line fence, with adverse possession of the land inclosed, under the consent of the grantor and his successors in interest, is sufficient to put a purchaser upon inquiry as to the contemporaneous construction placed by the parties upon conflicting calls in the description. *Davies v. Wickstrom*.. 154

BREACH:

- Of contract for carriage of goods, see **CARRIERS**, 1-5.
- Of contract in general, see **CONTRACTS**, 1, 4.
- Of covenants, see **COVENANTS**.
- Of warranty to maintain sprinkler system in sawmill, see **INSURANCE**, 3, 4.
- Of covenant against assignment of lease, see **LANDLORD AND TENANT**, 3.
- Of contract of sale, see **SALES**, 7, 8.
- Of contract for sale of land, see **VENDOR AND PURCHASER**.

BREACH OF MARRIAGE PROMISE:

1. **BREACH OF MARRIAGE PROMISE—QUESTION FOR JURY.** In an action for breach of promise of marriage, the question of the promise is for the jury, where the evidence is conflicting and the course of conduct strongly corroborates the plaintiff. *Fisher v. Kenyon*.. 8
2. **SAME—FINANCIAL ABILITY OF DEFENDANT—EVIDENCE—ADMISSIBILITY.** In an action by a woman for a breach of promise of marriage which occurred but a few months before the action was commenced, evidence of the defendant's financial ability at the time of the trial is admissible. *Fisher v. Kenyon*..... 8
3. **SAME—DAMAGES—EXCESSIVE VERDICT.** A verdict for \$9,000 for breach of promise of marriage, reduced by the trial court to \$6,000, is not excessive, where it appears that the parties were engaged for two years, that defendant induced the plaintiff to remove from Montana to this state where the wedding was to take place, that she was greatly humiliated, and the defendant admitted that he was worth \$25,000, and there was evidence that he was worth several times that amount. *Fisher v. Kenyon*..... 8

BROKERS:

- Retroactive effect of statute relating to contracts for broker's commissions, see **FRAUDS, STATUTE OF**, 5.

1. **BROKERS—AUTHORITY—FRAUDS, STATUTE OF—CONTRACT TO SELL LANDS.** Letters to a broker fixing a price which owners would take

BROKERS—CONTINUED.

for their property "and let you have six months' time to sell it in," on commission, merely authorize the broker to find a purchaser, and not to make a binding contract of sale that can be specifically enforced. *Lawson v. King*..... 15

2. **BROKERS—COMMISSIONS—EFFICIENT CAUSE OF SALE.** A broker is not entitled to recover part of a commission agreed upon between him and defendant, another broker, where it appears that the defendant had the property listed for sale at \$50,000, and agreed to divide commissions with plaintiff if a sale was made to plaintiff's prospective customer, whose name was given to defendant, and who made an offer of \$42,000 through another broker who also had the property listed for sale, which offer was accepted by the owner; since it does not appear that plaintiff was the efficient cause of the sale. *Dalke v. Sivyer*..... 462

3. **BROKERS — COMMISSIONS — CONTRACTS — EVIDENCE — SUFFICIENCY.** Where the owner of mortgaged land sold the same and applied to the person to whom he had given the mortgages to substitute a new loan in a larger sum to the vendees, and agreed to pay a commission of \$350 for "negotiating" the loan, the owner is liable for the commissions although the mortgagee made the loan himself, he not having acted as a broker on the sale or in any fiduciary capacity, the application for a loan having been made to him to make the loan himself, and the mortgage being given in his name. *Bruce v. Bevis* 547

4. **BROKERS—COMMISSIONS—CONTRACTS—PERFORMANCE—DEFENSES—FAILURE OF TITLE.** Brokers are entitled to their agreed commissions as a matter of law, where they procured a binding contract with a purchaser, able and willing to complete the deal, which failed for defects in the title unknown to the brokers, although there was testimony to the effect that the commission was to be paid only out of the last payment and that the same was not to be paid if the sale was not consummated; since the agreement did not contemplate the failure of the sale by reason of the fault of the grantors. *Dean v. Williams* 614

BUILDINGS:

Maintaining illegal buildings, see **ADJOINING LANDOWNERS.**

BURDEN OF PROOF:

On motion to dissolve attachment, see **ATTACHMENT, 1.**

Consent of parent to sale of liquor to minor, see **INTOXICATING LIQUORS, 5.**

Instructions in action for personal injuries, see **NEGLIGENCE, 2.**

BURGLARY:

1. **BURGLARY—ENTRY—TIME—EVIDENCE—SUFFICIENCY.** The evidence is insufficient to warrant a conviction for entering a ship in the nighttime with intent to commit a misdemeanor, where no breaking was alleged and it devolved upon the state to prove entry in the nighttime, and from the evidence the property was not missed until more than two hours after daylight. *State v. Gunderson*..... 672

CALLS:

In deeds, see **BOUNDARIES**.

CANCELLATION OF INSTRUMENTS:

Rescission of contracts, see **SALES**, 5, 6.

Rescission of contract of sale of land, see **VENDOR AND PURCHASER**, 7.

CARRIERS:

Excessive damages, see **DAMAGES**, 4, 5.

Conductor's accident report as self-serving declaration, see **EVIDENCE**, 5.

Master's liability for injuries to servant, see **MASTER AND SERVANT**, 12.

1. **CARRIERS—OF GOODS—CONTRACT—BREACH—RESCISSION—SHIPPING.** A carrier's breach of contract, by reason of the disablement of a vessel and the abandonment of her sailing, is not waived or the contract of carriage rescinded by a telegram calling upon the carrier to forward the freight by next sailing and to do all possible to remedy the delay and that the consignor would do the same, especially when a letter referring to the telegram and sent at the same time did not admit the carrier's right to breach the contract and contained only the consignor's assurance that he would do all he could to mitigate the damages. *Revett v. Globe Navigation Co.*.. 550
2. **SAME—TENDER OF CARGO—WHEN EXCUSED.** It is not ground for a nonsuit, in an action for breach of contract of the carriage of freight, that the freight was not delivered or tendered on the dock for shipment on the sailing date, when the ship was not ready at that time to receive the cargo and the sailing date was later cancelled because of her disability, especially where there was testimony that the load was ready and waiting when she got in, or in cars ready to be transferred, evidently so prearranged for convenience in unloading heavy materials from the cars without passing through a warehouse. *Revett v. Globe Navigation Co.*..... 550
3. **SAME — CONTRACT — BREACH — CONSTRUCTION.** A consignor's contract to ship on a carrier's line all of his freight, consisting of two cargoes of lumber and heavy machinery, is not breached by him, as a matter of law, by the shipment of camp equipment and property of a like character, which went forward with the consignor's men on

CARRIERS—CONTINUED.

- one or more ships of another line; especially where the carrier's first ship was loaded to capacity and refused to take all that had been agreed should go on her. *Revett v. Globe Navigation Co.*.. 550
4. SAME. Such loss of carriage, if allowable at all, would only be an offset, and could not bar an action for general damages on breach of the contract, the contract not having been rescinded. *Revett v. Globe Navigation Co.*..... 550
5. SAME. A nonsuit in an action for breach of contract to ship cargoes of freight on or about two specified dates, cannot be sustained by reason of the fact that certain articles were not ready for shipment on the first sailing date, when it appears that they were not intended for that cargo and were to be shipped later, and the damage did not result from the failure to ship such part earlier. *Revett v. Globe Navigation Co.*..... 550
6. SAME—INSTRUCTIONS AS TO DUTY. It is not prejudicial error to instruct that a carrier owes a special duty to a female passenger to protect her from insults, as it owes that duty to all passengers. *Caldwell v. Northern Pac. R. Co.*..... 223
7. CARRIERS—DUTY TO PASSENGERS—INSULTS—QUESTION FOR JURY. Whether the use of the words "such as you" by a railroad conductor was intended to be insulting or disparaging to a passenger who was afflicted with a bodily infirmity is a question for the jury. *Caldwell v. Northern Pac. R. Co.*..... 223
8. CARRIERS—INJURY TO PASSENGER—PASSES—QUESTION FOR JURY. In an action by a passenger for personal injuries, where there was a conflict in the evidence as to whether she was riding on a pass waiving liability, and she testified positively that she was not and had paid her fare, the question is for the jury. *Conner v. Seattle, Renton & Southern R. Co.*..... 310
9. CARRIERS—NEGLIGENCE—SETTING DOWN PASSENGERS—INSTRUCTIONS. In an action for negligence of a carrier in putting off an intoxicated passenger at a dangerous place, it is applicable and proper to instruct that the carrier owed to its passengers the highest degree of care and prudence practicably consistent with the operation of its road and letting them on and off its cars. *Bennett v. Seattle Electric Co.* 407
10. CARRIERS—INJURIES TO PASSENGERS—PLEADING—COMPLAINT. A complaint alleging that a car had stopped and passengers were alighting, and that plaintiff was violently thrown to the ground by the sudden starting of the car without warning while she was in the act of alighting, states a cause of action, although it is alleged that the plaintiff, on account of defective eyesight, could not know whether the car was in motion. *Mueller v. Washington Water Power Co.* 556

CARRIERS—CONTINUED.

11. **CARRIERS—INJURIES TO PASSENGERS—DEGREE OF CARE—INSTRUCTIONS.** It is proper to instruct that a street railway company, operating by electricity in the carriage of passengers, must use "the highest degree of care, skill, and diligence practicable, consistent with the operation" and it is liable for "the slightest negligence in said operation," as the latter is but a corollary of the former. *Mueller v. Washington Water Power Co.*..... 556
12. **CARRIERS—NEGLIGENCE — SETTING DOWN PASSENGERS — EVIDENCE—SUFFICIENCY.** Negligence in putting an intoxicated passenger off at his station while the train was moving is not shown where it merely appears from his testimony that he became intoxicated on the train and was awakened at his station and some one pushed him off the train; there being nothing but speculation or conjecture to connect the trainmen with the affair, and they having denied putting him off or any knowledge of how he got off. *Knapp v. Northern Pac. R. Co.* 662
13. **CARRIERS — DRUNKEN PASSENGER — CONTRIBUTORY NEGLIGENCE.** A carrier having accepted a passenger who was unable to care for himself by reason of intoxication, his duty to care for his own safety should be measured by his condition as to sobriety, as a corollary of the rule that the company owed him a duty commensurate with his condition. *Bennett v. Seattle Electric Co.*..... 407

CATTLE GUARDS:

Negligence in maintenance of, see **RAILROADS**.

CERTAINTY:

Of contract, see **CONTRACTS**, 1.

In indictment or information, see **INDICTMENT AND INFORMATION**, 1.

Of contract as affecting right to specific performance, see **SPECIFIC PERFORMANCE**, 2.

CERTIFICATE:

Of physician as evidence of total disability, see **DAMAGES**, 10.

CERTIORARI:

Review of condemnation proceedings, see **EMINENT DOMAIN**, 10.

1. **CERTIORARI—WHEN LIES—VACATION OF JUDGMENT—REMEDY BY APPEAL.** Certiorari does not lie to review an order vacating a default judgment; since there is an adequate, though less speedy, remedy by appeal from the final judgment. *Jones v. Paul.*.... 355
2. **CERTIORARI — ADEQUATE REMEDY BY APPEAL—DISCOVERY—INSPECTION OF PAPERS.** Certiorari does not lie to review an order for the inspection of papers, made under Bal. Code, § 6047, since there is an adequate remedy by appeal from the final judgment. *State ex rel. Seattle General Contract Co. v. Superior Court.*..... 649

CERTIORARI—CONTINUED.

3. **CERTIORARI—APPLICATION—TIME.** As the statute fixes no time within which to apply for a writ of certiorari, by analogy, application for a writ must be made within the time for taking an appeal. *State ex rel. Tumwater Power & Water Co. v. Superior Court*.. 287

CESSATION OF CONTROVERSY:

Effect on appeal, see **APPEAL AND ERROR**, 5.

CHARACTER:

Of witness, see **WITNESSES**, 8.

CHARGE:

To jury in criminal prosecutions, see **CRIMINAL LAW**, 10, 11, 20.
To jury in civil actions, see **TRIAL**.

CHARTER:

Of municipal corporations, see **MUNICIPAL CORPORATIONS**, 2-5, 10.

CHECKS:

Forgery of checks, see **FORGERY**.

CHILD:

See **ADOPTION**.

CITIES:

See **MUNICIPAL CORPORATIONS**.

CIVIL RIGHTS:

Constitutional guaranty of civil rights, see **CONSTITUTIONAL LAW**.

CLAIMS:

Against estate of insolvent corporations, see **CORPORATIONS**, 13.
Mining claims, see **MINES AND MINERALS**.

CLOUD ON TITLE:

See **QUIETING TITLE**.

COHABITATION:

As raising presumption of valid ceremonial marriage, see **MARRIAGE**.

COLLATERAL ATTACK:

On state deed to tide lands, see **PUBLIC LANDS**, 3.

COLLATERAL SECURITY:

See **PLEDGES**.

COMMERCE:

Carriage of goods and passengers, see **CARRIERS**.
Grant of tide lands under state deed as interference with Federal right to regulate, see **NAVIGABLE WATERS**.

COMMISSIONERS:

Conclusiveness of acts of state oyster commission, see PUBLIC LANDS, 4.

COMMISSIONS:

Of broker, see BROKERS.

COMMON CARRIERS:

See CARRIERS.

COMMUNITY PROPERTY:

In general, see HUSBAND AND WIFE.

COMPENSATION:

For property taken for public use, see EMINENT DOMAIN, 4, 12, 13.

COMPETENCY:

Of witnesses in general, see WITNESSES.

COMPETITION:

Sales on execution for cash only as preventing competitive bid, see MORTGAGES, 9.

COMPROMISE AND SETTLEMENT:

See PAYMENT.

Fraud in partnership settlement, see PARTNERSHIP.

Relinquishment of right or claim by release thereof, see RELEASE.

1. COMPROMISE AND SETTLEMENT—MISTAKE—EVIDENCE—SUFFICIENCY.
A finding that there was no mistake or fraud in a compromise and settlement is justified by the evidence, where after action brought upon an account extending over a period of years, the parties got together, the accounts were gone over, item by item, and \$3,550 was finally paid in full satisfaction of claims amounting to \$4,743.85; and it appears that the claim of mistake related to a note of \$700 and interest which had been twice charged in the account, which double charge was admitted, but there was evidence that a credit was given for the double charge prior to the settlement, and the note was one of the disputed items in the settlement. *Maynard v. First Bank of Colton*..... 486

CONCLUSIVENESS:

Matters and parties concluded by judgment, see JUDGMENT, 2-4.

CONDEMNATION:

Taking property for public use, see EMINENT DOMAIN.

CONDITIONAL SALES:

See SALES, 9.

CONDITIONS:

Demand for costs as condition precedent to continuance, see **CONTINUANCE**.

Precedent to condemnation proceedings, see **EMINENT DOMAIN**, 6, 9.

On granting or refusing new trial, see **NEW TRIAL**, 6.

On permitting amendment of pleading, see **PLEADING**, 3.

As affecting tender, see **TENDER**, 2.

Precedent to forfeiture of contract, see **VENDOR AND PURCHASER**, 4-6.

CONDONATION:

See **DIVORCE**, 2.

CONDUCT OF COUNSEL:

In criminal prosecutions, see **CRIMINAL LAW**, 18, 19.

CONFESSION:

Admissibility in evidence, see **CRIMINAL LAW**, 8-11.

CONFIRMATION:

Of foreclosure sale, see **MORTGAGES**, 6.

CONSENT:

Parent's consent to sale of liquor to minor, see **INTOXICATING LIQUORS**, 4, 5.

CONSIDERATION:

Of contract in general, see **CONTRACTS**, 2.

For stock subscription, see **CORPORATIONS**, 5.

CONSTITUTIONAL LAW:

1. **CONSTITUTIONAL LAW—RIGHTS OF ACCUSED—CRIMINAL LAW—NOTICE OF NATURE OF OFFENSE—WAIVER.** Constitution, art. 1, § 22, providing that the accused shall have the right to demand a copy of the charge against him, and Bal. Code, § 6879, providing that such copy shall be served, merely grant a privilege that is waived by plea and entering upon the trial without request for the copy, service of which is not jurisdictional. *State v. Quinn*..... 295

CONSTRUCTION:

Of conflicting calls in description by parties, see **BOUNDARIES**, 2, 3.

CONTEST:

Of election, see **ELECTIONS**.

CONTINUANCE:

In criminal prosecutions, see **CRIMINAL LAW**, 12.

Failure to ask continuance on amendment of pleadings, see **PLEADING**, 4.

1. **CONTINUANCE—ABSENCE OF EVIDENCE—DISCRETION—COSTS.** It is discretionary to grant a continuance to enable a party to secure

CONTINUANCE—CONTINUED.

evidence, and error cannot be predicated thereon when the adverse party did not ask for costs as a condition precedent. *Sholin v. Skamania Boom Co.*..... 303

CONTRACTS:

Promise of marriage, see BREACH OF MARRIAGE PROMISE.

Compensation of broker, see BROKERS, 3, 4.

Transportation of goods, see CARRIERS, 1-5.

Subscription to corporate stock, see CORPORATIONS, 4, 5.

Corporate contracts, see CORPORATIONS, 10-12.

Covenants in deeds, see COVENANTS.

Parol evidence to vary, see EVIDENCE, 9-13.

Agreements within statute of frauds, see FRAUDS, STATUTE OF.

Of insurance in general, see INSURANCE.

Of marriage, see MARRIAGE.

Party wall agreements, see PARTY WALLS.

Release of rights, see RELEASE.

Sales of personalty, see SALES.

Specific performance, see SPECIFIC PERFORMANCE.

Subrogation to rights or remedies of creditors, see SUBROGATION.

Sale of land, see VENDOR AND PURCHASER.

Rescission of sale of land, see VENDOR AND PURCHASER, 7.

1. CONTRACTS—ASSENT—PRELIMINARY NEGOTIATIONS—ORAL PROMISE FOR WRITTEN CONTRACT. An oral contract made in July, for the logging of certain land at an agreed price per thousand, the work to commence about September following, and which fixed the place of delivery and time of payment, is not a completed contract so as to be binding until it was reduced to writing, where it was understood that the same was to be reduced to writing wherein the details should be stated, which writing should be executed upon the return of one of the parties from a brief trip. *McDonnell v. Coeur d'Alene Lumber Co.* 495
2. CONTRACTS — CONSIDERATION — GRATUITOUS SERVICE — MORTGAGE—AGREEMENT TO SECURE INSURANCE—LIABILITY FOR LOSS. A mortgagee who had required a stipulation in the mortgage for insurance of buildings on the premises is not liable for the loss of the property by reason of agreeing to secure the insurance, accepting the insurance premium, and giving a receipt therefor, where he had not entered upon performance of the service, unless the same was all one continuous transaction, so that the giving of the mortgage would constitute the consideration for the agreement to secure insurance; the mere payment and acceptance of the premium being *nudum pactum* and insufficient alone to support a subsequent promise. *Hudson v. Ellsworth*..... 243
3. CONTRACTS—VALIDITY—PUBLIC POLICY—PUBLIC LANDS—ARID LAND ENTRY FOR USE OF ANOTHER. Under the Carey Act, 28 U. S. Stat.

CONTRACTS—CONTINUED.

at Large, 422, granting arid land to the states to be sold "in small tracts to actual settlers," and the laws of Idaho requiring a settler, upon final proof, to make oath that he has entered the land for his sole benefit, an oral contract by a prospective settler to enter land in trust for another, who advanced money for expenses, contemplates perjury, and is void as against public policy. *McMillan v. Wright* 114

4. SAME—ACTIONS—ISSUES AND PROOF — PLEADINGS — AMENDMENTS. Where plaintiffs were orally promised a written contract for the logging of land, and moved their outfit preparatory to the work in reliance thereon before any contract was made, upon failure of the action for breach of the contract to log, in which there was no offer to amend or proof of any damage by reason of the moving of the outfit, the complaint should not be treated as amended on appeal or the judgment of dismissal reversed to allow a recovery for damages. *McDonnell v. Coeur d'Alene Lumber Co.* 495

CONVERSATIONS:

Cross-examination of witness as to conversations, see WITNESSES, 6.

CONVEYANCES:

As security for debt, see MORTGAGES.

CORPORATIONS:

Death of officer as abatement of action, see ABATEMENT AND REVIVAL.
Supersedeas of temporary injunction against stockholders, effect, see APPEAL AND ERROR, 11, 12.

Appointment of agent for irrigation district, see COURTS, 2.

Condemnation of corporate property for public use, see EMINENT DOMAIN.

Mandamus to control corporate acts and proceedings, see MANDAMUS.

Estoppel of judgment creditor to ask vacation of foreclosure sale, see MORTGAGES, 2.

Municipalities, see MUNICIPAL CORPORATIONS.

Water companies, see WATERS AND WATER COURSES, 4, 5.

1. CORPORATIONS—ORGANIZATION—RIGHT TO CORPORATE NAME—FORFEITURE—MANDAMUS. Mandamus will not issue to require the secretary of state to strike the name of a corporation from the records for nonpayment of license fees, pursuant to Laws 1907, p. 272, on the application of a new corporation that sought to take the same name, after the first corporation's name had been stricken by mistake pending negotiations for the adjustment of the first corporation's delinquent license fees, which it was making an honest effort to ascertain and pay. *State ex rel. Harper v. Howell* 694

CORPORATIONS—CONTINUED.

2. SAME—CONTRACTS—ESTOPPEL. A person dealing with a *de facto* corporation is estopped to deny its corporate capacity. *American Radiator Co. v. Kinnear*..... 210
3. CORPORATIONS—EVIDENCE OF INCORPORATION—WAIVER BY PLEADING. A defendant corporation waives proof of its corporate existence by appearing generally and going to trial on the merits. *Hale v. Crown Columbia Pulp and Paper Co.*..... 236
4. CORPORATIONS—EXISTENCE—CONTRACTS—SUBSCRIPTION TO STOCK—NECESSITY. Subscription to the capital stock of a corporation is not essential to its legal existence or liability on its contracts. *American Radiator Co. v. Kinnear*..... 210
5. CORPORATIONS—SUBSCRIPTION TO STOCK—NOTES FOR PRICE—DEFENSES—FRAUD—ESTOPPEL. Statements in fine print in a signed application to purchase corporate stock do not estop the maker of promissory notes given for the price of the stock from setting up the defense of want of consideration and fraudulent representations, although technically construed the statements might be deemed admissions contrary to the facts proven. *Cunningham v. Morris*. 341
6. CORPORATIONS—STOCKHOLDERS AND TRUSTEES—DEADLOCK—FAILURE TO OPERATE PLANT. Where, owing to the obstinacy of two parties each owning one-half of the stock of a corporation, there was no board of trustees to manage its affairs, and the deadlock prevented an election, the parties are *in pari delicto*, and there can be no recovery by one from the other by reason of business losses, or failure to repair and operate the plant after a loss by fire. *Weymouth v. Oudin*..... 315
7. CORPORATIONS—OFFICERS—LIABILITY FOR DEBTS. The liability of officers for corporate debts depends upon statutory provisions or the legal existence of the corporation. *American Radiator Co. v. Kinnear* 210
8. SAME—LIABILITY OF OFFICERS. The transaction of business by a corporation before all of its capital stock is subscribed, contrary to Laws 1895, p. 338, does not render its officers individually liable for the debts upon the insolvency of the corporation, since the liability of officers is restricted to certain other cases by Bal. Code, §§ 4265, 4266, etc. *American Radiator Co. v. Kinnear*..... 210
9. CORPORATIONS—STOCK HELD BY OTHER CORPORATION. Laws 1905, p. 51, authorizing corporations to own and hold stock in other corporations is constitutional. *State ex rel. McIntosh v. Superior Court* 214
10. CORPORATIONS—CONTRACTS—AUTHORITY OF OFFICERS. The recovery of judgment against a corporation on contract is conclusive that the officers had authority to make the contract. *American Radiator Co. v. Kinnear* 210

CORPORATIONS—CONTINUED.

11. CORPORATIONS—CONTRACTS—REPRESENTATION—AUTHORITY OF OFFICERS AND AGENTS. A corporation is bound by a contract for the purchase of land scrip where it was interested in that business and placed its vice president and secretary in sole charge of its head office with apparent authority to deal in scrip, and they designated an agent as the corporation's agent with authority to represent it in the purchase of scrip, and did not promptly disavow a contract made by the agent. *Moses Land Scrip and Realty Co. v. Stack-Gibbs Lumber Co.* 529
12. CORPORATIONS—CONTRACTS—TRANSACTING BUSINESS PRIOR TO SUBSCRIPTION TO STOCK. The transaction of business by a corporation before all of its capital stock is subscribed, contrary to Laws 1895, p. 338, does not render its contracts void; since only the state can complain of violation of the statute. *American Radiator Co. v. Kinnear* 210
13. CORPORATIONS—STOCKHOLDERS—RECEIVER—ACTION BY—ESTOPPEL—PERSONS AFFECTED. Where there are no creditors of a corporation and a receiver is appointed to wind up its affairs, and sues on claims, representing the rights of a faction of the stockholders, an estoppel against such stockholders operates against the receiver. *Weymouth v. Oudin*..... 315
14. CORPORATIONS—INSOLVENCY—ASSETS—PURCHASE BY STOCKHOLDERS—FRAUDULENT CONVEYANCES. Part of the stockholders of an insolvent corporation may, as individuals, subscribe a fund with which to purchase the corporate assets upon the foreclosure of a *bona fide* mortgage thereon, where the stock was nonassessable and other stockholders would not raise funds by a *pro rata* voluntary assessment; and such transaction is not a fraud on creditors where the property was openly and fairly purchased at a public execution sale. *Boyes v. Turk Mining Co.*..... 515
15. SAME—TRUST FUND—RIGHTS OF CREDITORS. That the assets of an insolvent corporation constitute a trust fund for the benefit of creditors does not affect the validity of a foreclosure sale under a mortgage given by the corporation before insolvency. *Boyes v. Turk Mining Co.*..... 515
16. CORPORATIONS—INSOLVENCY—PREFERENCE TO CREDITORS. Findings that a mortgage was given by a corporation after insolvency and is fraudulent as to creditors, are sustained where there was some evidence tending to show that fact and the mortgage covered practically all of its property and was given to a trustee as a preference to secure certain antecedent creditors. *Bohling v. Hendron*... 687

COSTS:

As condition of granting continuance, see CONTINUANCE.
 For breach of covenant, see COVENANTS, 5.

COSTS—CONTINUED.

Attorney's fees in action for slander of title, see **LIBEL AND SLANDER**, 2.

Payment of costs as condition for amendment, see **PLEADING**, 3.

1. **COSTS—TAKING DEPOSITIONS—ALLOWANCE.** Where it appears that \$100 was actually expended in taking depositions, an allowance of \$40 costs therefor will not be disturbed on appeal. *Roebeling's Sons Co. v. Washington Alaska Bank*..... 102
2. **COSTS—ATTORNEY'S FEES.** Upon the second successful jury trial of a case, after a reversal on appeal, the plaintiff is entitled to tax but one statutory attorney's fee, under Bal. Code, § 5172, which has reference only to the final judgment in the case. *Bennett v. Seattle Electric Co.* 407
3. **COSTS—ON APPEAL—DIVORCE—ATTORNEY'S FEES.** Upon affirming a decree of divorce in favor of a wife, the attorney's fees on appeal will be confined to the statutory costs. *Smith v. Smith*..... 461

COUNCIL:

Recall of councilman, see **MUNICIPAL CORPORATIONS**, 1-5.

COUNSEL:

See **ATTORNEY AND CLIENT**.

COUNTIES:

Embezzlement by county auditor, see **EMBEZZLEMENT**, 1-4.

COURSES AND DISTANCES:

See **BOUNDARIES**.

COURTS:

Nature and grounds of appellate jurisdiction in general, see **APPEAL AND ERROR**.

Review of decisions, see **APPEAL AND ERROR**, 2-4.

Former decision as law of the case on subsequent appeal, see **APPEAL AND ERROR**, 34.

Jurisdiction of lower court after supersedeas and stay of proceedings, see **APPEAL AND ERROR**, 11.

Judicial notice, see **EVIDENCE**, 2, 3.

Jurisdiction of proceedings to sell real estate of decedent, see **EXECUTORS AND ADMINISTRATORS**.

Review of orders or judgments on habeas corpus, see **HABEAS CORPUS**.

Conclusiveness of judgments, see **JUDGMENT**, 2-4.

Prohibiting judicial proceedings, see **PROHIBITION**.

1. **COURTS—POLICE JUSTICE—SELECTION FROM JUSTICE OF THE PEACE—STATUTES—CONSTRUCTION—"MAY" OR "MUST."** Under Laws of 1903, p. 102, specifying as one of the officers of a town of the third class, to be appointed by the mayor, "a police justice, who may be one of

COURTS—CONTINUED.

the justices of the peace of the precinct," it is not required that one of such justices be appointed, from the fact that cities of the first class are limited to two justices of the peace, one of whom must be appointed as police justice, and that Laws 1890, page 196, also authorizes the selection of a police justice from the two justices of the peace in towns or cities; since "may" is not to be construed as "must" unless a duty is imposed making a permissive construction repugnant to the intent or leading to an absurdity. *State ex rel. Purdin v. Gault*..... 140

2. COURTS—ENFORCEMENT OF ORDER—APPOINTMENT OF COMMISSIONER—CORPORATIONS—FAILURE OF AGENTS. Under Bal. Code, § 4717, the court has power to appoint a commissioner to act for an irrigation district, where the district was mandamusd to sell bonds and it appeared that the president of the board of directors was insane and the board was without a quorum. *State ex rel. Dyer v. Middle Kittitas Irrigation District*..... 488

COVENANTS:

Parol evidence, see EVIDENCE, 10.

Party wall agreement as creating covenant running with land, see PARTY WALLS.

1. COVENANTS—AGAINST ENCUMBRANCES—BREACH—LEASE. The unexpired term of a valid lease, subsisting at the date of the execution of a deed, is an encumbrance and a breach of covenants of warranty, and entitles the grantee to damages. *O'Connor v. Enos*..... 448
2. COVENANTS—BREACH—ACTION — DEFENSES — ESTOPPEL. The fact that grantees are estopped by their own acts to recover possession of the granted premises, does not prevent recovery from the grantor of damages for breach of covenant against encumbrances by reason of an unexpired lease. *O'Connor v. Enos*..... 448
3. COVENANTS—AGAINST ENCUMBRANCES—NOTICE OF—ESTOPPEL. Notice of an outstanding lease does not estop the grantee from recovering damages for breach of covenants against encumbrances. *O'Connor v. Enos*..... 448
4. COVENANTS—AGAINST ENCUMBRANCES—MEASURE OF DAMAGES. Upon a breach of covenant of warranty against encumbrances by reason of an unexpired lease, the measure of damages is the rental value of the premises during the withholding. *O'Connor v. Enos* 448
5. SAME—EXPENSES INCURRED—ESTOPPEL. Upon a breach of covenant of warranty against encumbrances by reason of an unexpired lease, the grantee cannot recover the costs incurred in a prior action to recover possession, where the court held in that action that they were estopped by their own acts to maintain that action, such judgment being conclusive. *O'Connor v. Enos*..... 448

CREDITORS:

Subrogation to rights of creditors, see SUBROGATION.

CRIMINAL LAW:

See BURGLARY; EMBEZZLEMENT; FORGERY; GAMING; HOMICIDE; RAPE.
Constitutional right to demand copy of charge, see CONSTITUTIONAL LAW.

Habeas corpus to review proceedings, see HABEAS CORPUS.

Conviction of offense included in that charged, see INDICTMENT AND INFORMATION, 5.

Allegations in indictment, see INDICTMENT AND INFORMATION.

Unlawful sale of liquor, see INTOXICATING LIQUORS.

Words charging crime as libelous *per se*, see LIBEL AND SLANDER, 1.

To restrain trial pending appeal in habeas corpus, see PROHIBITION.

Operation and time of taking effect of laws, see STATUTES.

Trial of civil actions, see TRIAL.

Cross-examination of witnesses, see WITNESSES, 5, 6.

Competency of husband and wife to testify in criminal prosecution, see WITNESSES, 2, 3.

1. **CRIMINAL LAW—FORMER JEOPARDY—DISMISSAL AFTER JURY SWORN.** A plea of former jeopardy is properly sustained where the accused had been placed on trial before a court of competent jurisdiction on a sufficient indictment before a jury empaneled and sworn, when the charge was dismissed on motion of the state without his consent or any sufficient reason. *State v. Kinghorn*..... 131
2. **SAME—EXCUSE FOR DISMISSAL—TRIAL COMMENCED WITHOUT PLEA.** That the accused had been placed on trial before he had been arraigned or had pleaded is not ground for dismissal by the state without his consent, where he had thereafter entered a plea of not guilty, as an issue was formed which put him in jeopardy. *State v. Kinghorn* 131
3. **SAME—PLEA OF INSANITY—WITHDRAWAL—EFFECT.** Laws 1907, p. 33, § 2, provides for a separate plea of insanity, "in addition to the plea or pleas" required by law, so that withdrawal of the same does not affect the trial on the other pleas. *State v. Quinn*..... 295
4. **SAME—RECORD OF PLEA—PRESUMPTIONS.** Where the accused, after overruling a demurrer to the information, announced himself ready for trial, it will be presumed that a plea had been entered even if not shown by the record. *State v. Quinn*..... 295
5. **CRIMINAL LAW—PLEA OF NOT GUILTY—RECORD.** A plea reciting in the first division that the accused "hereby enters his plea of not guilty" and adding pleas of mental irresponsibility and insanity, shows an affirmative plea of not guilty. *State v. Quinn*..... 295
6. **CRIMINAL LAW—EVIDENCE—PROOF OF MOTIVE.** In a prosecution for murder, when the accused is shown beyond a reasonable doubt to have committed the crime, proof of motive is not essential to sustain a conviction. *State v. Barker*..... 510

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7. CRIMINAL LAW—EVIDENCE—HEARSAY. The statement of an officer identifying a gun and cartridges handed to him by another, who told him they belonged to the defendant, is not inadmissible as hearsay, where the other person was called and testified that the defendant gave her the gun and cartridges shortly after the shooting and that she gave them to the officer. *State v. Quinn*..... 295
8. CRIMINAL LAW—EVIDENCE—CONFESSIONS—TRIAL. Upon an objection to admissions by the accused on the ground of duress, the question whether the admissions were voluntary or were made under the influence of fear produced by threats, within Bal. Code, § 6942, is a mixed question of law and fact and may properly be determined by the judge upon an examination of the witnesses in the presence of the jury. *State v. Barker*..... 510
9. SAME—APPEAL—REVIEW. Such decision is reviewable on appeal as any other question of law or fact passed upon by the court. *State v. Barker*..... 510
10. SAME — CONFESSIONS — INSTRUCTIONS—ISSUE AND PROOF. Where there was no question but what confessions were voluntary, it is not error to refuse to submit to the jury the question whether they were voluntary. *State v. Barker*..... 510
11. CRIMINAL LAW—EVIDENCE—CONFESSIONS—EFFECT. The jury is properly instructed that voluntary confessions are to be considered as any other testimony, and may be rejected or believed, either in whole or in part. *State v. Barker*..... 510
12. CRIMINAL LAW—CONTINUANCE—INDORSEMENT OF WITNESS AT TRIAL. The defendant is not entitled to a continuance, as a matter of right, upon allowing the state to indorse the name of a witness on the information at the trial, where no showing is made of prejudice to defendant's rights. *State v. Carpenter*..... 670
13. CRIMINAL LAW—TRIAL—INDORSEMENT OF WITNESS — DISCRETION. Allowing the indorsement of the names of witnesses upon the information after trial commenced is largely discretionary, and not ground for reversal in the absence of abuse of discretion. *State v. Quinn* 295
14. CRIMINAL LAW — TRIAL — WITNESSES—INDORSEMENT. In the absence of any showing of prejudice, it is not reversible error to allow at the trial the indorsement of the name of a witness upon the information and permit him to testify. *State v. Carpenter*..... 670
15. CRIMINAL LAW — TRIAL — OFFENSE UNDER DIFFERENT STATUTES—ELECTION. In a prosecution for embezzlement of fees by a county auditor, it is not error to refuse to require the prosecuting attorney to elect under which of several statutes providing different penalties he will proceed, the acts charged being punishable under any of them. *State v. Leonard*..... 83

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16. CRIMINAL LAW—TRIAL—DUTY OF PROSECUTOR. The prosecuting attorney is a *quasi* judicial officer and it is his duty to see that one accused of a public offense is given a fair trial. *State v. Montgomery* 443
17. CRIMINAL LAW—TRIAL—CONDUCT—WITNESSES—EXPERT—EXAMINATION. In a prosecution for murder, it is not error for the court, on the last day of the trial, to refuse to appoint a chemist to examine the clothes worn by the accused for blood stains, the state not having claimed that they were blood stained, and the accused not having subpoenaed any witness for that purpose. *State v. Barker* 510
18. CRIMINAL LAW—TRIAL—MISCONDUCT OF PROSECUTOR—WITNESSES—TESTIMONY OBTAINED BY DURESS. It is prejudicial error for the prosecuting attorney, after the prosecuting witness had denied the charges against the defendant, to state in the presence of the jury that the witness had made many contrary statements to him and had been tampered with and bought, to examine the witness at length as to the statements, which the witness admitted having made but insisted were false and obtained by duress, and finally, after temporarily excusing the witness, to state to her that she could be imprisoned for perjury; and evidence given by her against the defendant thereafter is obtained by duress and cannot sustain a conviction. *State v. Montgomery*..... 443
19. CRIMINAL LAW—TRIAL—CONDUCT OF COUNSEL—PERSISTING IN IMPROPER CROSS-EXAMINATION. In a prosecution for forgery, in which the accused, who had been living with her mother, testified that she went to Spokane to engage in work to meet pressing obligations, it is prejudicial error, requiring a reversal, for the state, on cross-examination and after objections had been sustained, to persistently question the accused with respect to her financial embarrassments in an effort to show that they arose out of litigation with her mother in which the accused was charged with "swindling" and "defrauding" her mother and was only prevented from so doing by a decision of the highest court of a sister state, the litigation being foreign to the issue and the only purpose being to discredit her before the jury by improper questions. *State v. Cottrell*..... 543
20. CRIMINAL LAW—INSTRUCTIONS—REASONABLE DOUBT. An instruction, considered as a whole, correctly defines a reasonable doubt, where it is stated that the law did not require absolute certainty, or proof beyond the possibility of error, and required the jury to be convinced to a moral certainty and to have an abiding conviction of the defendant's guilt; although it contains the statement that the law of reasonable doubt is based upon the doctrine of reasonable probability, which might be objectionable if standing alone. *State v. Quinn*..... 295

CRIMINAL LAW—CONTINUED.

21. **CRIMINAL LAW—VERDICT—SUFFICIENCY.** A verdict finding the accused guilty of murder in the first degree (for which the penalty is death) and recommending him to the mercy of the court, is not void and does not show doubt in the minds of the jury, the recommendation being merely surplusage. *State v. Arata*..... 185
22. **CRIMINAL LAW—TRIAL—VERDICT—FORM.** A verdict finding the defendant guilty as charged in the "information" is not prejudicially erroneous from the fact that the trial was upon a "complaint," where the two words were used interchangeably throughout the trial; the form prescribed by Bal. Code, § 6961, being only directory. *State v. McCormick* 469
23. **CRIMINAL LAW—APPEAL—HARMLESS ERROR.** Error in admitting hearsay evidence to identify a gun as that of the accused is harmless where the accused admitted his ownership while on the witness stand. *State v. Quinn*..... 295

CROSS-APPEALS:

Necessity for, to review errors, see **APPEAL AND ERROR**, 18.

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See **WITNESSES**, 5, 6.

CROSSINGS:

Accident at street railroad crossings, see **STREET RAILROADS**.

CRUELTY:

Ground for divorce, see **DIVORCE**, 1.

CUSTODY:

Support and custody of children, see **DIVORCE**, 6; **PARENT AND CHILD**.

CUSTOMS AND USAGES:

Validity of marriage according to Indian customs, see **MARRIAGE**, 3.

DAMAGES:

Right to make remission and accept verdict after failure to comply with decision affirming conditional grant of new trial, see **APPEAL AND ERROR**, 35.

For taking appeal for delay, see **APPEAL AND ERROR**, 38.

Breach of marriage promise, see **BREACH OF MARRIAGE PROMISE**, 3.

Delay in transportation or delivery of goods, see **CARRIERS**, 4.

For breach of covenant, see **COVENANTS**.

Condemnation of property taken for public use, see **EMINENT DOMAIN**, 4, 12, 13.

Special damages for obstruction of highway, see **HIGHWAYS**, 6.

Rights of assignees on assignment of lease without landlord's consent, see **LANDLORD AND TENANT**, 3.

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For libel or slander, see **LIBEL AND SLANDER**, 2.

Remission of excess as condition of denying motion for new trial, see **NEW TRIAL**, 6.

Ground for new trial, see **NEW TRIAL**, 1, 2.

Release of claim for damages, see **RELEASE**.

For breach of contract for sale of goods, see **SALES**, 7.

Breach by vendor of contract for sale of land, see **VENDOR AND PURCHASER**, 10, 12.

1. **DAMAGES—MENTAL SUFFERING—EVIDENCE TO SUSTAIN—INSULTS—WANTONNESS.** A passenger cannot recover compensatory damages for mental suffering from an insult on the mere declaration that she has suffered in feelings; but to sustain a recovery for more than nominal damages it must appear from attending circumstances that there was warrant for the mental attitude and wilful or wanton disregard of her rights. *Caldwell v. Northern Pac. R. Co.*..... 223
2. **DAMAGES—PERSONAL INJURIES—EXCESSIVE VERDICT.** A verdict for \$7,500 for personal injuries is not excessive where it appears that the plaintiff, twenty-nine years of age, with a hand that had been broken and which was nearly normal, and who had been subjected to an operation closing the lower bowels and making an artificial anus in his side, under partial control, was able to do light work, and earned \$2.50 a day grinding knives in a planing mill, and by reason of a fall from his bicycle, the knuckles of his hand were rebroken, and the injury made permanent, his other trouble increased, the bowel protruding and getting beyond all control, causing great pain and suffering, and disabling him from performing work of any kind, and that the injury will increase as time progresses. *Dunkin v. Hoquiam* 47
3. **DAMAGES—EXCESSIVE VERDICT—ASSAULT.** A verdict in favor of a woman for \$1,000 for an assault and battery, reduced by the trial court to \$750, will not be held excessive on appeal, where it appears that the assault was unprovoked and she was seriously injured, and that it was accompanied by scandalous language tending to defame and vilify her. *Neilsen v. Hovander*..... 93
4. **DAMAGES—PERSONAL INDIGNITIES—EXCESSIVE VERDICT—NEW TRIAL.** A verdict for one thousand dollars in favor of a crippled passenger, for insults by the conductor, is so excessive as to show passion or prejudice requiring a new trial, where it merely appears that the conductor provided a place for plaintiff and her wheel chair in the express car and required her to ride there when there were seats in the passenger coach in which she was entitled to ride, and that he did not act in a wanton manner or with any wilful intent to heap indignity upon her, and there was no greater degree of wrong or humiliation than embarrassment. *Caldwell v. Northern Pac. R. Co.* 223

DAMAGES—CONTINUED.

5. **DAMAGES—PERSONAL INJURIES—EXCESSIVE VERDICT.** A verdict for \$6,750 for injuries sustained by a passenger thrown to the ground in alighting from an electric car, is excessive and should be reduced to \$5,250, where it appears that the plaintiff was fifty years of age and her hip joint was fractured, resulting in the shortening of a limb one-half inch, except for which she would be fairly recovered in one year, and she was able to attend to household duties at the time of the trial. *Mueller v. Washington Water Power Co.*..... 556
6. **DAMAGES—PLEADING—COMPLAINT.** In an action for personal injuries, the complaint is sufficiently definite where it alleges that plaintiff's right knee was "skinned and bruised." *Dunkin v. Hoquiam* 47
7. **DAMAGES—EVIDENCE—MATERIALITY.** In an action for personal injuries sustained by a person who was infirm from a previous disability, the cause of the previous difficulty and advice thereon is immaterial. *Dunkin v. Hoquiam*..... 47
8. **DAMAGES—EVIDENCE—ADMISSIBILITY.** In an action for permanent personal injuries, resulting in total disability, by one who was infirm, but who was earning \$2.50 a day before the accident, it is proper to exclude papers offered in evidence to show that the plaintiff was drawing a pension for total disability from injuries received in the service of the government, where the only identification of the papers was the statement of the witness that he received them in the mail, and believed them to be the original papers. *Dunkin v. Hoquiam* 47
9. **SAME—EVIDENCE—REMOTENESS.** Such papers are inadmissible where they relate to a time eight years before the accident, as they are too remote. *Dunkin v. Hoquiam*..... 47
10. **SAME—HEARSAY.** The certificate of a physician as to a total disability, made in a pension matter, is inadmissible to show the disability, as it is hearsay. *Dunkin v. Hoquiam*..... 47

DEATH:

Of party as ground for abatement, see **ABATEMENT AND REVIVAL**.
 Dying declarations in prosecutions for homicide, see **HOMICIDE**, 2, 3.

DECEDENTS:

Testimony as to transactions with persons since deceased, see **WITNESSES**, 4.

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Reviewable on appeal, see **APPEAL AND ERROR**, 2-4.
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As evidence in civil actions, see EVIDENCE, 5.

Dying declarations, see HOMICIDE, 2, 3.

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Construction of building restriction, see ADJOINING LANDOWNERS.

Description of boundaries, see BOUNDARIES.

Validity, construction and effect of covenants in deeds, see COVENANTS.

Admissibility in evidence, see EVIDENCE, 6.

Grants of tide and oyster lands, see PUBLIC LANDS, 2-4.

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Alder of defective pleadings by default judgment, see PLEADING, 7.

In payment of installments as forfeiture, see VENDOR AND PURCHASER, 2-6.

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Instructions defining degrees of offense, see HOMICIDE, 6.

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In transportation or delivery of goods by carrier, see CARRIERS, 1-5.

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In delivery of goods sold, see SALES, 5, 6.

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Instructions as to time for, see HOMICIDE, 5.

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Of goods to carrier, see CARRIERS, 2, 3, 5.

Of goods sold, see SALES, 1, 2, 4-7.

DEMAND:

For payment of bill or note, see BILLS AND NOTES, 5.

Necessity to show demand made for payment of fees, see EMBEZZLEMENT, 2.

For trial by jury, see JURY, 2.

For payment as condition to right of forfeiture, see VENDOR AND PURCHASER, 4.

DEMURRER:

As mode of objecting to defects as to parties, see PARTIES.

To pleading, see PLEADING, 1.

Motion to quash *quo warranto* as demurrer to information, see QUO WARRANTO.

DEPOSITION:

Allowance of costs for taking, see COSTS, 1.

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Keeping tender good by deposits in court, see **TENDER**, 4.

DESCENT AND DISTRIBUTION:

Rights of heirs in community property, see **HUSBAND AND WIFE**, 1.

DESCRIPTION:

Of property conveyed, see **BOUNDARIES**.

Certainty of description prerequisite to award of specific performance, see **SPECIFIC PERFORMANCE**, 2.

In tax foreclosure and deed, see **TAXATION**, 5.

DILIGENCE:

In application to vacate judgment, see **JUDGMENT**, 7.

DISABILITIES:

See **ALIENS**.

DISCHARGE:

See **COMPROMISE AND SETTLEMENT**.

Of accommodation maker by extension of time, see **BILLS AND NOTES**, 3.

On habeas corpus, see **HABEAS CORPUS**.

Of mortgage lien by tender, see **MORTGAGES**, 11-13.

From claim for damages, see **RELEASE**.

DISCOVERY:

Appealability of order for inspection of papers, see **APPEAL AND ERROR**, 3.

Certiorari to review order for inspection of papers, see **CERTIORARI**, 2.

1. **DISCOVERY—POWER TO ORDER INSPECTION OF PAPERS—APPEAL.** Bal. Code, § 6047, authorizing the court to order an inspection of papers material as evidence in a cause, does not contemplate an inspection of confidential and privileged matter not admissible in evidence; and the party may refuse to submit to the invasion of private rights and appeal from a judgment of contempt. *State ex rel. Seattle General Contract Co. v. Superior Court*..... 649

DISCRETION OF COURT:

Review of discretionary action, see **APPEAL AND ERROR**, 23, 24.

To grant continuance, see **CONTINUANCE**.

Indorsement of witnesses at trial, see **CRIMINAL LAW**, 13.

In opening default judgment, see **JUDGMENT**, 8.

Vacation of sale for inadequacy of price, see **JUDICIAL SALES**, 1.

Submission of issues to trial by jury, see **JURY**, 2.

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To allow amendment of pleadings, see **PLEADING**, 3, 4.

Competency of child to testify, see **WITNESSES**, 1.

DISMISSAL AND NONSUIT:

- Review and waiver of errors on appeal, see **APPEAL AND ERROR**, 21.
- Dismissal of appeal, see **APPEAL AND ERROR**, 5, 10, 13, 17, 38.
- Dismissal of charge after jury sworn as former jeopardy, see **CRIMINAL LAW**, 1, 2.
- Payment on dismissal of suits and application of payments, see **PAYMENT**.

DISSOLUTION:

- Of attachment, see **ATTACHMENT**.

DISTRICT AND PROSECUTING ATTORNEYS:

- Duties in trial of criminal cases, see **CRIMINAL LAW**, 16, 18.

DISTRICTS:

- Irrigation districts, see **WATERS AND WATER COURSES**, 3.

DIVERSION:

- Of water course, see **WATERS AND WATER COURSES**, 2.

DIVORCE:

- Admission of evidence as harmless error, see **APPEAL AND ERROR**, 33.
- Costs on affirmance, see **COSTS**, 3.
- Nature of property acquired after divorce, see **HUSBAND AND WIFE**, 3.
- 1. **DIVORCE—GROUNDS—RENDERING LIFE BURDENSOME—COMPLAINT—SUFFICIENCY.** A complaint for a divorce on the ground of personal indignities rendering life burdensome states a cause of action when it alleges that the husband applied profane and vulgar language to the wife and was guilty of cruelty consisting of physical violence. *Briggs v. Briggs*..... 580
- 2. **DIVORCE—DEFENSES—INDISCREET CONDUCT OF WIFE—CONDONATION.** A divorce for misconduct of the husband should not be denied a wife because of indiscreet or disgraceful acts committed by the wife in the husband's presence and with his approval. *Briggs v. Briggs* 580
- 3. **DIVORCE—VACATION—GROUNDS—JURISDICTION.** Under Bal. Code, § 5153, subdiv. 4, the superior court has jurisdiction to vacate a decree of divorce procured by fraud, regardless of whether the service was personal or by publication; although Bal. Code, § 4880, authorizing the opening of default judgments for the purpose of defending the action within one year, when secured on service by publication, expressly excepts judgments for divorce. *Chaney v. Chaney* 145
- 4. **SAME—PETITION—SUFFICIENCY.** A petition to vacate a decree of divorce on the ground of fraud, filed in the action, is not demurrable for failure to set out the decree, where it leaves no uncertainty as to the nature of the decree, the grounds therefor, the parties, court, and date. *Chaney v. Chaney*..... 145

DIVORCE—CONTINUED.

5. **SAME—FRAUD.** Fraud, warranting the vacation of a decree of divorce, is shown by a petition alleging that a husband sent his wife cash, promising to join her, and three months later commenced an action for divorce, securing service by publication and mailing to a wrong address, at the same time writing her many letters and keeping her in ignorance of the action, of which she had no notice until after the decree. *Chaney v. Chaney*..... 145
6. **DIVORCE—CUSTODY OF CHILDREN—WELFARE OF CHILD.** An order awarding the custody of a daughter fourteen years of age to the mother, upon a divorce, will not be disturbed when in harmony with the welfare of the child. *Wingard v. Wingard*..... 354

DOCKS:

See WHARVES.

DOCUMENTS:

Production and inspection of writings, see **DISCOVERY**.
As evidence in civil actions, see **EVIDENCE**, 6, 8.

DURESS:

Testimony obtained by duress, see **CRIMINAL LAW**, 18.

DYING DECLARATIONS:

See **HOMICIDE**, 2, 3.

EASEMENTS:

Affecting party walls, see **PARTY WALLS**.

EJECTMENT:

1. **EJECTMENT — DEFENSES — NECESSITY OF PLEADING — ISSUES AND PROOF—GENERAL DENIAL.** Although the plaintiff in ejectment fails to deraign his title, the defendant cannot, under a general denial, introduce affirmative evidence to show title in himself by adverse possession, under Bal. Code, § 5509, providing that the defendant shall not be allowed to give in evidence an estate in himself or right to the possession unless the same is pleaded in his answer. *Brown v. Haley*..... 218

ELECTION OF REMEDIES:

Election of prosecutor to proceed under one of several statutes providing different penalties for embezzlement, see **CRIMINAL LAW**, 15.
Recovery of money judgment as bar to mandamus, see **MANDAMUS**.

1. **ELECTION OF REMEDIES—RECEIVERS—TRIAL OF TITLE TO PROPERTY—WAIVER OF OBJECTIONS.** Where, upon an order to show cause, the parties appeared in a receivership matter, and by consent tried out a question of title, upon pleadings filed, the right to litigate the title in an independent action is waived. *Olympic Oil Co. v. Kane* 199

ELECTIONS:

Jurisdiction to hear contest as moot question, see **APPEAL AND ERROR**, 1.

Of municipal officers, see **MUNICIPAL CORPORATIONS**, 4, 5.

1. **ELECTIONS — CONTEST — NOTICE — JURISDICTION — STATUTES.** Bal. Code, § 1433, requiring the issuance of a citation to defendant in an election contest to appear on a day fixed by the court, is not mandatory in the sense of requiring an order on the day the contest is filed or within any specified time thereafter, and a futile attempt to fix a day for the hearing, without the issuance of jurisdictional process, does not affect the jurisdiction of the court to fix another day and cause a citation to issue thereon. *Thomas v. Van Zandt*.. 595
2. **SAME—TIME FOR GIVING NOTICE—JURISDICTION.** The statute not requiring the court to give a notice and fix a date for hearing an election contest on the day the contest is filed, a delay from November 23 to December 9th in so doing does not deprive the court of jurisdiction. *Thomas v. Van Zandt*..... 595
3. **SAME—DATE OF HEARING—TIME.** Bal. Code, § 1433, requiring the court to fix a date for hearing an election contest, and to give a notice thereof of not less than ten nor more than twenty days from the date of the notice, does not require the fixing of a date within twenty days from the date of filing of the contest. *Thomas v. Van Zandt* 595
4. **SAME — PROCEEDINGS—NOTICE—HEARING—TIME FOR.** Under Bal. Code, § 1430, requiring an election contest to be filed within ten days after canvass of the votes, and §1433, requiring the judge to fix a date for hearing and to give a notice thereof not less than ten nor more than twenty days from the date of the notice, the proceedings are timely and regular where the canvass was made November 23, the contest filed November 25, and the order made December 9th fixing December 22 as the date of hearing. *Thomas v. Van Zandt* 595
5. **SAME—NOTICE OF CONTEST—BY WHOM GIVEN—CITATION.** Under Bal. Code, § 1433, providing that the judge may give notice and order a session of the court on a day fixed for the hearing of an election contest, and § 1434, providing that the clerk shall also at the time issue a citation to the defendant to appear at the time and place specified in said notice, and providing the manner of service of the citation, the judge may cause notice to be given by the issuance of the citation. *Thomas v. Van Zandt*..... 595

EMBEZZLEMENT:

Election to proceed under statutes providing different penalties, see **CRIMINAL LAW**, 15.

Sufficiency of information, see **INDICTMENT AND INFORMATION**, 1.

1. **EMBEZZLEMENT—OF FEES BY SALARIED COUNTY OFFICERS—SUFFICIENCY.** An information charging that the defendant is a county

EMBEZZLEMENT—CONTINUED.

auditor who receives a salary and that he collected fees and refused to account for and embezzled the same, charges an offense under Bal. Code, § 1606, making it embezzlement for any salaried county officer to receive fees by virtue of his office and fail to pay the same to the county treasury. *State v. Leonard*..... 83

2. **SAME—DEMAND—NECESSITY.** In a prosecution of a salaried county auditor for the embezzlement of fees which came into his hands by virtue of his office and which he failed to pay to the county treasurer, it is not necessary to show that any demand was made upon him for the payment of the fees. *State v. Leonard*..... 83
3. **SAME—INTENT—INSTRUCTIONS.** In a prosecution of a salaried county officer for the embezzlement of fees which he failed to pay into the county treasury, the proposition that a criminal intent is essential is sufficiently covered, where the jury were so instructed, and that they could not convict if the failure to pay was due to neglect or carelessness without an intent to defraud the county. *State v. Leonard*..... 83
4. **SAME—EVIDENCE—SUFFICIENCY.** The evidence is sufficient to sustain a conviction of embezzlement by a salaried county auditor for failing to pay over \$165 collected for hunting license fees, where there was no question over the defalcation, and no intricacy in the bookkeeping, and the defendant had stated that he knew of the shortage and exactly how much it amounted to; although the defendant after his term had expired, had expressed a willingness to make good the deficiency, the statute requiring monthly payments of such collections. *State v. Leonard*..... 83
5. **EMBEZZLEMENT—BY AGENT—EVIDENCE—ADMISSIBILITY.** In a prosecution for the embezzlement of money sent to the defendant to pay taxes on the land of the prosecuting witness, the land having been left in charge of the defendant, it is relevant and pertinent for the state to show that the defendant witnessed a deed purporting to convey the land and knew of the change in title, and had not used the money for the purpose for which it was sent. *State v. Nilson* 289
6. **SAME—EVIDENCE—SUFFICIENCY.** The evidence is sufficient to sustain a conviction for embezzlement, where it appears that defendant received a certain sum of money for the specific purpose of paying taxes on land, and failed to use it for that purpose and deceived his principal in the matter. *State v. Nilson*..... 289
7. **SAME—EVIDENCE—ADMISSIBILITY—CRIMINAL LAW—BEST AND SECONDARY EVIDENCE.** In a prosecution for the embezzlement of money sent to pay taxes, certified copies of tax receipts made from the originals in the treasurer's office, showing the payment of the taxes by others, are competent to show *prima facie* that defendant did not pay the taxes, where the treasurer testified that he paid no

EMBEZZLEMENT—CONTINUED.

taxes; and the same are not subject to the objection that the defendant was not confronted with the witness against him. *State v. Nilson* 289

8. **SAME—EVIDENCE—ADMISSIBILITY—INSTRUCTIONS.** In a prosecution for embezzlement of money sent to pay taxes on land left in charge of the defendant, evidence in regard to a deed of the land to another, and defendant's knowledge thereof, is properly submitted to the consideration of the jury in so far as it had a tendency to show the guilty knowledge of the defendant, who deceived the prosecuting witness in receiving the money for a specific purpose. *State v. Nilson* 289

EMINENT DOMAIN:

1. **EMINENT DOMAIN—PUBLIC USE—EVIDENCE—SUFFICIENCY.** The evidence of an engineer in charge of the surveys that a certain lot was necessary for the use of a railroad for a warehouse in which to handle its freight business is competent and sustains a finding that it was necessary for a public use. *State ex rel. True v. Superior Court* 249
2. **SAME—STOCK—RAILROAD—PUBLIC PURPOSE.** The fact that the stock of a railroad company is held by individuals or a corporation having a special interest in the construction of the road does not affect the public character of the road. *State ex rel. McIntosh v. Superior Court* 214
3. **SAME—RAILROAD—PRIVATE PURPOSES.** A railroad may condemn land in aid of its public purposes only, although it is also authorized to engage in private business. *State ex rel. McIntosh v. Superior Court* 214
4. **EMINENT DOMAIN—COMPENSATION—VALUE OF LAND—BOOM SITE.** In condemnation of shore and uplands needed by a boom company for booming purposes, the jury may take into consideration the value of the land as a boom site, where the defendants are owners of the shore as well as the uplands. *Columbia and Cowlitz River Boom and Rafting Co. v. Hutchinson*..... 323
5. **EMINENT DOMAIN—PETITION—SUFFICIENCY—ALLEGING PUBLIC USE.** A petition to condemn a right of way for a railroad alleging that, when constructed, it will be a common carrier of passengers, is not demurrable for failure to allege that the land will be devoted to a public use. *State ex rel. McIntosh v. Superior Court*..... 214
6. **SAME—CONDITIONS PRECEDENT—BRIDGE OVER NAVIGABLE STREAM.** The consent of the War Department to bridge a navigable stream is not a condition precedent to the condemnation of a railroad right of way crossing the stream. *State ex rel. McIntosh v. Superior Court* 214

EMINENT DOMAIN—CONTINUED.

7. **SAME—DEFENSES—LACHES.** Laches in failing to build its line is no defense to a proceeding by a railroad company to condemn land, where it is about to utilize the property and is fully authorized. *State ex rel. McIntosh v. Superior Court*..... 214
8. **SAME—DEFENSES—EXTENT OF USE.** That a railroad line is but 6½ miles long is not a defense to a proceeding to condemn its right of way. *State ex rel. McIntosh v. Superior Court*..... 214
9. **SAME—CONDITIONS PRECEDENT—SUBSCRIPTION TO STOCK.** A subscription to the capital stock of a railroad company by trustees is sufficient to authorize it to exercise the right of eminent domain, especially where the stock is all paid in. *State ex rel. McIntosh v. Superior Court* 214
10. **EMINENT DOMAIN — PROCEEDINGS — REVIEW.** Appeal or writ of certiorari in condemnation proceedings must be taken within thirty days, and the pendency of an appeal is no excuse for failure to apply for a writ of certiorari. *State ex rel. Tumwater Power & Water Co. v. Superior Court*..... 287
11. **EMINENT DOMAIN—PROCEEDINGS—PROPER PARTIES—MORTGAGEE AND LIENORS.** Under Bal. Code, § 5638, providing that notice in condemnation shall be served on the owner, encumbrancer or tenant or person otherwise interested in the land, mortgagees, lien claimants, and a city having a lien for assessments, are proper parties defendant. *North Coast R. Co. v. Hess*..... 335
12. **SAME—LIENORS—RIGHT TO AWARD—EQUITABLE RIGHT OF COMPANY TO DISCHARGE OF CLAIMANTS NOT PARTIES.** Where, in condemnation proceedings, the railway company failed to make a mortgagee and lien claimants parties defendant, and they failed to come in voluntarily under Bal. Code, § 5644, and claim an interest in the award of damages, their liens against the property were not affected by an award of damages for the full value of the land, paid into court; but they have the same rights in equity against the fund representing the land as they had against the land, and as though they had been claimants under the statute; hence the railway company, having paid full value, had an equitable right, irrespective of statute, to be protected against the liens through proper control of the funds in court; and it was error to order the fund paid to the owners without discharge of the liens, against objection by the company. *North Coast R. Co. v. Hess*..... 335
13. **SAME—RIGHT OF TENANTS.** In such a case, a specific sum awarded to the tenant in possession as the value of his leasehold may properly be ordered paid to him. *North Coast R. Co. v. Hess*..... 335

EMPLOYEES:

See MASTER AND SERVANT.

EMPLOYMENT:

Admissibility of evidence in action for services, see **ATTORNEY AND CLIENT**, 1.

EQUITY:

See **SPECIFIC PERFORMANCE**; **SUBROGATION**.

Scope and extent of review in equitable actions, see **APPEAL AND ERROR**, 18.

Equitable estoppel, see **ESTOPPEL**.

Relief against judgment, see **JUDGMENT**, 5-8.

Right to jury trial in equitable action, see **JURY**, 1.

Foreclosure of maritime liens, see **MARITIME LIENS**.

Vacation of foreclosure sale, see **MORTGAGES**, 2.

Determination of adverse claims to real property, see **QUIETING TITLE**.

Effect in equity of tender, see **TENDER**, 4, 5.

1. **EQUITY—LACHES—LIMITATION OF ACTIONS.** Laches will not bar an action to recover real property where suit is brought within the period of the statute of limitations. *Roger v. Whitham*..... 190

ESCROWS:

Evidence to vary escrow agreement, see **SALES**, 4.

ESTABLISHMENT:

Of highways, see **HIGHWAYS**, 1-5.

Of lost instruments, see **LOST INSTRUMENTS**.

ESTATES:

Estates of deceased persons, see **EXECUTORS AND ADMINISTRATORS**.

ESTOPPEL:

To allege error in civil actions or proceedings, see **APPEAL AND ERROR**, 21.

To deny corporate existence, see **CORPORATIONS**, 2.

Against stockholders as affecting receiver, see **CORPORATIONS**, 13.

To deny validity of stock subscription, see **CORPORATIONS**, 5.

To recover damages for breach of covenant, see **COVENANTS**.

By election of remedy, see **ELECTION OF REMEDIES**.

Of administratrix to deny validity of deed or to claim ownership after sale, see **EXECUTORS AND ADMINISTRATORS**, 2.

To claim benefit of admissions in pleading, see **HUSBAND AND WIFE**, 4.

By judgment, see **JUDGMENT**, 2-4.

To ask vacation of foreclosure sale, see **MORTGAGES**, 2.

To claim error in application of payments on dismissal of suits, see **PAYMENT**.

To declare forfeiture for nonpayment of installment, see **VENDOR AND PURCHASER**, 3.

Of company in action to compel public service by water company, see **WATERS AND WATER COURSES**, 5.

ESTOPPEL—CONTINUED.

1. **ESTOPPEL—EQUITABLE ESTOPPEL—REPRESENTATIONS.** The doctrine of equitable estoppel applies in cases not reached by common law estoppel by deed or records, and where a person wrongfully or negligently causes another to rely upon acts or representations to his prejudice. *Carruthers v. Whitney*..... 327

EVIDENCE:

- Of adoption of child, see **ADOPTION**, 1.
- Abandonment of child by parent, see **ADOPTION**, 2, 3.
- Of adverse possession, see **ADVERSE POSSESSION**.
- Prejudice from error on appeal, see **APPEAL AND ERROR**, 31-33.
- Review after waiver of nonsuit, see **APPEAL AND ERROR**, 21.
- For assault, see **ASSAULT AND BATTERY**.
- Sufficiency for dissolution of attachment, see **ATTACHMENT**, 2, 3.
- For attorney's fee, see **ATTORNEY AND CLIENT**.
- Admissibility on issue of reasonable attorney's fee, see **BILLS AND NOTES**, 6.
- Parol evidence to show liability as surety, see **BILLS AND NOTES**, 3.
- For breach of marriage promise, see **BREACH OF MARRIAGE PROMISE**, 1, 2.
- In action for broker's compensation, see **BROKERS**, 3.
- In prosecution for burglary, see **BURGLARY**.
- For injuries to passenger, see **CARRIERS**, 12.
- Of mistake or fraud in settlement, see **COMPROMISE AND SETTLEMENT**.
- Absence of as ground for continuance, see **CONTINUANCE**.
- Evidence of corporate existence, see **CORPORATIONS**, 3.
- Costs of documentary evidence, see **COSTS**, 1.
- In criminal prosecutions, see **CRIMINAL LAW**, 6-8, 11, 18, 23.
- In action for personal injuries, see **DAMAGES**, 7-10.
- Discovery of evidence, see **DISCOVERY**.
- In ejectment, see **EJECTMENT**.
- In prosecution for embezzlement, see **EMBEZZLEMENT**, 5-8.
- Value of property in condemnation proceedings, see **EMINENT DOMAIN**, 4.
- To show public use in taking of property, see **EMINENT DOMAIN**, 1.
- Of forgery, see **FORGERY**.
- Of establishment of highway by prescription, see **HIGHWAYS**, 1-5.
- Opinion evidence as to decedent's belief of impending death when making dying declaration, see **HOMICIDE**, 2.
- Insanity, see **INSANE PERSONS**.
- Breach of warranty in policy, see **INSURANCE**, 3.
- Sale of liquor to minor, see **INTOXICATING LIQUORS**, 3.
- To establish lost instrument, see **LOST INSTRUMENTS**.
- Of marriage, see **MARRIAGE**.
- For injuries to servant in general, see **MASTER AND SERVANT**, 2, 8, 9, 12.
- Of jurors on motion for new trial, see **NEW TRIAL**, 4.

EVIDENCE—CONTINUED.

Newly discovered evidence as ground for new trial, see **NEW TRIAL**, 3.
 Of abandonment and adoption of child, see **PARENT AND CHILD**.
 Against railroad company for injuries to animals, see **RAILROADS**.
 Admissibility of complaints by prosecutrix, see **RAPE**.
 Of fraud in procuring release of claim for damages, see **RELEASE**.
 To show breach of contract to sell land scrip, see **SALES**, 8.
 Parol evidence to vary writing, see **SALES**, 4.
 Comment on by judge, see **TRIAL**, 2.
 Fraud in representing land, see **VENDOR AND PURCHASER**, 1.
 Credibility, impeachment, contradiction and corroboration of witnesses, see **WITNESSES**, 5.
 Admissibility of evidence as to transactions with decedent, see **WITNESSES**, 2.

1. **EVIDENCE—PERSONAL INJURIES—PHYSICAL EXHIBITIONS.** A verdict for personal injuries will not be reversed for permitting the injured portions of the body to be exhibited to the jury on the ground that it enlisted their sympathy and was indecent. *Dunkin v. Hoquiam* 47
2. **EVIDENCE—JUDICIAL NOTICE—ORDER APPOINTING GUARDIAN AD LITEM.** In an action by a minor, by his guardian *ad litem*, the court will take judicial notice of its order appointing the guardian *ad litem*, for the purpose of the action, entered upon a petition referring to the complaint on the same day the complaint was filed. *Hale v. Crown Columbia Pulp and Paper Co.*..... 236
3. **EVIDENCE—JUDICIAL NOTICE.** The courts take judicial notice that in this latitude in August it is daylight in the morning at 5:30 o'clock. *State v. Gunderson*..... 672
4. **SAME—SECONDARY EVIDENCE—LOSS OF WRITING.** In such a case, upon establishing the loss of the receipt, oral evidence is admissible to prove its contents. *Hudson v. Ellsworth*..... 243
5. **EVIDENCE—SELF-SERVING DECLARATION—CONDUCTOR'S ACCIDENT REPORT—CARRIERS.** A conductor's written report of accident to a passenger, made at the time and soon thereafter given to the defendant, in compliance with its rules and custom, is inadmissible as it is a self-serving statement made in its own interest, and for the purpose of facilitating its defense. *Conner v. Seattle, Renton & Southern R. Co.*..... 310
6. **EVIDENCE—DOCUMENTARY EVIDENCE—STATE DEED.** A state deed is admissible in evidence without proof of compliance with the statute pursuant to which it was issued. *Palmer v. Peterson*..... 74
7. **EVIDENCE—LAWS OF ANOTHER COUNTRY—EXPERT EVIDENCE—FIXTURES.** The opinion of a barrister in British Columbia that certain machinery on mining property was a fixture in that province, is not controlling where he did not testify to any statute or judicial de-

EVIDENCE—CONTINUED.

- cision, especially where he erroneously assumed that the machinery was used in working a mine, and where, from decisions cited, it should be presumed that the general rule there was the same as our own. *Gasaway v. Thomas*..... 77
8. EVIDENCE—DOCUMENTARY EVIDENCE—BOOKS OF ORIGINAL ENTRY. In an action against a contractor's surety by materialmen, books kept by the contractors in the ordinary course of business, from slips furnished the bookkeeper by different persons making delivery of the materials, are competent as books of original entry to show the amount of material furnished for certain buildings, although the business manager testifying as to the entries had no personal knowledge of the transactions. *Cascade Lumber Co. v. Aetna Indemnity Co.* 503
9. EVIDENCE—PAROL EVIDENCE TO VARY WRITING. Where a mortgage provided that the mortgagor shall keep the buildings insured for the benefit of the mortgagee and deliver the policies of insurance to him, oral evidence that the mortgagee agreed to secure the insurance and that the mortgagor paid him \$30 and took a written receipt therefor at the time of the execution of the mortgage, is not inadmissible as varying the terms of the mortgage; and the mortgage and receipt should be construed as one instrument. *Hudson v. Ellsworth* 243
10. EVIDENCE—PAROL—TO VARY COVENANT. Parol evidence is inadmissible to show an exception which would destroy a plain unambiguous covenant against encumbrances. *O'Connor v. Enos*.... 448
11. EVIDENCE—CONTRACTS—PAROL EVIDENCE TO VARY WRITING. Where a written subcontract for railroad construction fixed a price of 90 cents per cubic yard for "solid rock excavation," evidence of a contemporaneous oral agreement to the effect that solid rock excavation was to be classified according to the principal contract not then at hand, and solid rock excavation "under three feet" to be paid for at a rate of three cents less than the rate of the principal contract, or \$1.22 per cubic yard, is inadmissible as varying the terms of the writing. *Tobin v. McArthur*..... 523
12. SAME. Parol evidence is inadmissible to show that a written contract is not complete by reason of a collateral oral agreement that part was intentionally omitted from the written contract and was to be incorporated later, where the written contract, by the voluntary act of the parties, included a complete contract on the subject-matter. *Tobin v. McArthur*..... 523
13. EVIDENCE—TO VARY WRITING—ADMISSIBILITY. Oral evidence to define and explain the term "Northern Pacific Scrip," issued under a specified act of Congress, does not vary the terms of a written contract for the sale thereof. *Moses Land Scrip and Realty Co. v. Stack-Gibbs Lumber Co.*..... 529

EVIDENCE—CONTINUED.

14. **EVIDENCE—OPINIONS.** Hypothetical questions based upon facts which the evidence tended to prove are admissible. *Dunkin v. Hoquiam* 47
15. **EVIDENCE—WEIGHT.** Negative testimony which cannot be accounted for or explained away on the theory of mistake or lack of knowledge is entitled to the same consideration as other testimony. *Catlin v. Sheldon*..... 423

EXAMINATION:

Of witness in criminal prosecution, see **CRIMINAL LAW**, 18, 19.
 Physical examinations at trial, see **TRIAL**, 1.
 Cross-examination, see **WITNESSES**, 5, 6.

EXCEPTIONS:

Necessity for exceptions for purpose of review, see **APPEAL AND ERROR**, 6-8.
 To findings by court, see **TRIAL**, 5.

EXCESSIVE DAMAGES:

See **BREACH OF MARRIAGE PROMISE**, 3; **DAMAGES**, 2, 5.
 Grounds for new trial, see **NEW TRIAL**, 1, 2.

EXECUTION:

- Exemptions from execution and protection of rights of exemption, see **EXEMPTIONS**.
 Exemptions from execution of real property as homestead, see **HOMESTEAD**.
 Sales on foreclosure of mortgage, see **MORTGAGES**, 3-9.
1. **EXECUTION—SUPPLEMENTAL PROCEEDINGS — OBJECTIONS — WAIVER.** Objection to the validity of proceedings supplementary to execution for the examination of the wife of a defendant cannot be urged where the case was tried on its merits, the appellant asked that the status of money deposited in bank in the name of the wife examined be determined, and she stated that she was ready to turn over money on the order of the court if it belonged to the defendant. *Breschli v. Kubillus*..... 541

EXECUTORS AND ADMINISTRATORS:

1. **EXECUTORS AND ADMINISTRATORS — SALES—VALIDITY — IRREGULARITIES.** Upon an administrator's sale of mortgaged property to pay off the mortgage, in which, upon petition and notice therefor, the court ordered a sale of other property in case of a deficiency, a sale accordingly to pay the deficiency, with deed issued, confirmed by the court, is not void (as against parties claiming under a title not derived from the deceased) by reason of the fact that Bal. Code, § 6289, requires, in case of such a deficiency, that the mortgagee file a claim for the balance payable in due course of administra-

EXECUTORS AND ADMINISTRATORS—CONTINUED.

tion; since the court had jurisdiction, and Bal. Code, § 6475, provides that no sale shall be void or called in question by one claiming adversely to the title of the deceased or under a title not derived from the deceased, for any irregularity, if it appears that the administrator was licensed to make the sale by an order of a court having jurisdiction of the estate, if a deed in legal form was executed and delivered; the omission of statutory proceedings for a deficiency sale in due course of administration being in such case an irregularity only. *Jones v. Seattle Brick & Tile Co.*..... 166

2. **EXECUTORS AND ADMINISTRATORS—SALE OF LAND—ESTOPPEL TO CLAIM INDIVIDUALLY.** An administratrix whose property was included in the inventory of the estate, and who petitioned for its sale as properly belonging to the estate, and made a deed conveying the same in terms upon payment of the price bid, is estopped to deny the validity of the deed or to assert her individual ownership or title thereto; especially where she agreed with creditors that it be sold as property of, and represented to the purchaser that it belonged to, the estate. *Carruthers v. Whitney*..... 327

EXEMPTIONS:

Exemption from forced sale of real property as homestead, see **HOMESTEAD**.

Intention to remove property as exempting from taxation at place found, see **TAXATION**, 2.

1. **EXEMPTIONS—HOMESTEAD—MECHANICS' LIENS—PRIORITY.** A mechanics' lien, filed prior to the declaration of homestead, takes precedence over the homestead exemption. *Olson v. Goodsell*..... 251

EXPATRIATION:

Effect on right to hold real property, see **ALIENS**.

EX POST FACTO:

Retroactive operation of criminal statutes, see **STATUTES**.

FALSE REPRESENTATIONS:

Affecting validity of contract for sale of lands, see **VENDOR AND PURCHASER**, 1.

FELLOW SERVANTS:

See **MASTER AND SERVANT**, 5-7.

FILING:

Statement of facts in lower court, see **APPEAL AND ERROR**, 16, 17.
 Claim or statement of mechanic's lien, see **MECHANICS' LIENS**.
 Of summons, see **PROCESS**.

FINDINGS:

- Review on appeal or writ of error, see **APPEAL AND ERROR**, 26.
- Review as dependent on presentation of objection below, see **APPEAL AND ERROR**, 6, 7.
- Necessity for notice of, see **TRIAL**, 5.

FIRE INSURANCE:

- See **INSURANCE**, 2-4.

FIXTURES:

- Expert evidence, laws of other country, see **EVIDENCE**, 7.

1. **FIXTURES—DEFINITION.** Whether an article, once a chattel, has become a fixture, depends (1) upon actual annexation to the realty, (2) application to the use to which that part of the realty is appropriated, and (3) the intention of the parties to make permanent accession to the freehold. *Gasaway v. Thomas*..... 77
2. **FIXTURES—WHAT LAW GOVERNS.** Upon a question as to fixtures on land in British Columbia, the law of that province governs. *Gasaway v. Thomas*..... 77
3. **FIXTURES — MINING MACHINERY — INSTALLED BY PURCHASER FOR PROSPECTING.** Mining machinery installed by a purchaser under a contract whereby he was to pay annual installments, and to take possession and prosecute a certain amount of development work, remains personal property which he can remove on forfeiting the contract before surrendering possession, where it appears from the purchaser's testimony that the machinery, a hoisting engine and boiler, were installed for the sole purpose of prospecting the claims and to determine their value, and were not suitable for working the mines. *Gasaway v. Thomas*..... 77

FORECLOSURE:

- Of maritime lien, see **MARITIME LIENS**, 2.
- Of mortgage, see **MORTGAGES**.
- Of tax lien, see **TAXATION**, 3-5.

FOREIGN JUDGMENTS:

- See **JUDGMENT**, 4.

FOREIGN STATUTES:

- Presumptions as to laws of other states, see **EVIDENCE**, 7.
- As governing question of fixtures, see **FIXTURES**.

FORFEITURE:

- Of corporate name by nonpayment of license, see **CORPORATIONS**, 1.
- Of insurance, see **INSURANCE**, 4.
- Waiver of by acceptance of rent, see **LANDLORD AND TENANT**, 3, 4.
- Of claim for failure to do assessment work, see **MINES AND MINERALS**, 3, 4.
- Of contract for failure to pay installments, see **VENDOR AND PURCHASER**, 2-6.

FORGERY:

Comparing handwriting on check with genuine by illustrations on blackboard, see **WITNESSES**, 7.

1. **FORGERY—EVIDENCE—HANDWRITING—PHOTOGRAPHS—ADMISSIBILITY.** In a prosecution for forgery it is not error to admit in evidence a photographic copy of a letter supposed to have been written by the accused, introduced for the purpose of comparison by the experts, where the accused, after examining the photograph, admitted that it was a photographic copy of her handwriting. *State v. Cottrell* 543
2. **FORGERY—EVIDENCE—HANDWRITING—IDENTIFICATION.** In a prosecution for forgery of a check of one J., another check purporting to be signed by him, admitted for comparison, is sufficiently identified when J. testified that he believed it was genuine. *State v. Cottrell* 543
3. **FORGERY—UTTERING CHECK — IDENTIFICATION — EVIDENCE — SUFFICIENCY.** There is sufficient evidence of the uttering of a forged check, where the manager and forewoman in a store each testified that the accused purchased goods, uttered the check in payment, and received her change, and the testimony of experts made a question for the jury as to whether the check was forged. *State v. Cottrell* 543

FORMER JEOPARDY:

Bar to prosecution, see **CRIMINAL LAW**, 1, 2.

FRANCHISE:

Grant to maintain wharf, see **MUNICIPAL CORPORATIONS**, 9-11.

Compelling public service under water company's franchise, see **WATERS AND WATER COURSES**, 4, 5.

FRAUD:

Evidence of in settlement, see **COMPROMISE AND SETTLEMENT**.

Subscription to corporate stock, see **CORPORATIONS**, 5.

Vacation of divorce decree, see **DIVORCE**, 3-5.

In partnership settlement, see **PARTNERSHIP**.

In application for sale of oyster lands, see **PUBLIC LANDS**, 4.

Release procured by fraud, see **RELEASE**.

Of vendor avoiding contract of sale of land, see **VENDOR AND PURCHASER**, 1.

FRAUDS, STATUTE OF:

Validity of oral authority to execute contract of sale, see **BROKERS**, 1.

1. **FRAUDS, STATUTE OF—ORAL LEASES.** An oral lease entered into in May, 1904, for the cropping season of 1905, is void by reason of the statute of frauds. *O'Connor v. Enos*..... 448
2. **SAME—ORAL LEASE—PART PERFORMANCE.** Taking possession of land under an oral lease for the next season, plowing, cultivating,

FRAUDS, STATUTE OF—CONTINUED.

and summer following the land, is such part performance as to take the same out of the operation of the statute of frauds. *O'Connor v. Enos* 448

3. **FRAUDS, STATUTE OF—PLEADING.** The defense that a contract is void under the statute of frauds for want of sufficient memorandum must be specially pleaded. *Moses Land Scrip and Realty Co. v. Stack-Gibbs Lumber Co.* 529

4. **SAME—MEMORANDUM OF SALE—SUFFICIENCY.** A signed offer for five thousand acres of "Northern Pacific Scrip," under a specified act of Congress, the price to be "fifteen dollars per acre net to you," is a sufficient memorandum of the sale of goods, wares and merchandise to take the same out of the operation of the statute of frauds, although it fixes no time for tender and payment, as a reasonable time would be presumed to be contemplated. *Moses Land Scrip and Realty Co. v. Stack-Gibbs Lumber Co.* 529

5. **FRAUDS, STATUTE OF—BROKERS' COMMISSIONS—STATUTES—RETROACTIVE EFFECT.** Laws 1905, p. 110, requiring contracts for the payment of a broker's commission on the sale of real estate is not retroactive and has no application to contracts made prior to its enactment. *Dean v. Williams* 614

FRAUDULENT CONVEYANCES:

By insolvent corporation, see **CORPORATIONS**, 14, 16.

GAMING:

Remand for proper sentence after conviction under charge of lesser offense, see **INDICTMENT AND INFORMATION**, 5.

1. **GAMING—KEEPING GAMBLING RESORT—INFORMATION—SUFFICIENCY.** An information charging that the defendants did conduct and carry on a gambling game with cards in a building where persons resort for that purpose is insufficient to charge a felony under Laws 1903, p. 63, making it a felony for "owners, proprietors, employees, or assistants" to open or conduct gambling games in such places; the statute being aimed at the keeping of gambling resorts. *State v. Gaasch* 381
2. **GAMING—INFORMATION—DEFINITENESS.** The felony of conducting or opening certain games of chance at a place "where persons resort for the purpose of gambling," under Laws 1903, p. 63, is not a "continuing" offense, and an information charging the crime as committed on different days between specified dates is not specific and certain as to the offense charged, and is demurrable in that it charges more than one offense. *State v. Hoffman* 622
3. **SAME—KEEPING RESORT—STATUTES—CONSTRUCTION.** The statute making it a felony for owners, proprietors, employees, etc., to conduct gambling games in a gambling resort "in any manner what-

GAMING—CONTINUED.

soever" does not amplify the intent of the law (which was aimed at keepers of resorts) so as to include those who play at the game. *State v. Gaasch*..... 381

4. **SAME—GAMBLING AND KEEPING RESORTS—STATUTES—REPEAL.** Laws of 1903, p. 63, making it a felony to keep a gambling resort, does not repeal Bal. Code, § 7260, making gambling for gain a misdemeanor. *State v. Gaasch*..... 381

GRAND JURY:

1. **GRAND JURY—DRAWING AND SUMMONING—TIME FOR SERVICE—STATUTES—CONSTRUCTION.** Laws 1909, p. 133, § 5, providing that grand jurors shall be "drawn from the jury list as hereinbefore provided" (for the drawing of petit juries), has no application to the portions of the preceding section requiring monthly jury terms and fixing the time for the commencement of the term on the first Monday of the ensuing month; hence it is within the discretion of the court to summon a grand jury to serve on the 22d of the same month. *State ex rel. Gibson v. Gilliam*..... 29
2. **SAME—STATUTES—IMPLIED REPEAL.** Laws 1905, p. 270, § 4, requiring the drawing of a grand jury to serve during the ensuing three months, is impliedly repealed by Laws 1909, p. 133, a complete act purporting to cover the whole subject of selecting and summoning grand and petit jurors. *State ex rel. Gibson v. Gilliam* 29

GRANTS:

Of land under navigable streams, see **NAVIGABLE WATERS.**

Of public lands, see **PUBLIC LANDS.**

GUARDIAN AND WARD:

Judicial notice of order appointing guardian *ad litem*, see **EVIDENCE, 2.**

HABEAS CORPUS:

Restraining trial of offense pending appeal in *habeas corpus*, see **PROHIBITION.**

1. **HABEAS CORPUS—GROUNDS—CORRECTION OF ERROR.** Habeas corpus does not lie to review or correct error, under Bal. Code, § 5826, providing that the legality of any judgment or process, whereby a party is in custody shall not be inquired into or the party discharged when the term of commitment has not expired upon any process issued on a final judgment of a court of competent jurisdiction. *In re Newcomb* 395
2. **SAME—ERRORS NOT AFFECTING JURISDICTION—DRAWING JURY.** Error in drawing and selecting a jury does not go to the jurisdiction of the court so as to entitle the defendant to a discharge on a writ of habeas corpus. *In re Newcomb*..... 395

HABEAS CORPUS—CONTINUED.

3. **SAME—COURTS—JURISDICTION—DEPARTMENTS.** There being but one superior court in a county, the fact that preliminary orders were made by judges other than the judge before whom the trial was had does not affect the jurisdiction of the court so as to entitle the defendant to a discharge on habeas corpus. *In re Newcomb*..... 395
4. **HABEAS CORPUS—CORRECTION OF ERROR—JURISDICTION—FORCE OR VALIDITY OF STATUTES—RIGHT TO WRIT.** Where the superior court having jurisdiction of an offense decided that the law defining the offense had not been repealed and was in force when the act was committed, the decision is within its jurisdiction, even if erroneous, and its final judgment is not void and cannot be questioned on a writ of habeas corpus, the remedy being by appeal, and this rule satisfies all the constitutional guaranties respecting the writ. *In re Newcomb* 395
5. **HABEAS CORPUS—CORRECTION OF ERRORS—JURISDICTION—FORCE OR VALIDITY OF STATUTES—RIGHT TO WRIT.** Where the superior court having jurisdiction decided that the law defining the offense had not been repealed and was in force when the act was committed, the decision is within its jurisdiction, even if erroneous, and habeas corpus does not lie to correct the same or to secure a discharge of the prisoner, his remedy being by appeal from the final judgment. *In re Hamilton*..... 405
6. **SAME—PURPOSE OF WRIT—RELIEF SOUGHT.** A writ of habeas corpus should not issue for the purpose of giving the prisoner an immediate trial as to the legality of his imprisonment, where he was about to have an immediate trial in a court of competent jurisdiction; nor for the purpose of delaying such trial. *In re Hamilton*..... 405

HANDWRITING:

Comparison and identification, see **FORGERY**.

Comparison by illustrations on blackboard during trial, see **WITNESSES**, 7.

HARMLESS ERROR:

In civil actions, see **APPEAL AND ERROR**, 30-33.

In criminal prosecutions, see **CRIMINAL LAW**, 23; **HOMICIDE**, 7.

HEARING:

Election contests, see **ELECTIONS**, 3.

HEARSAY EVIDENCE:

In criminal prosecutions, see **CRIMINAL LAW**, 7, 23.

In action for personal injuries, see **DAMAGES**, 10.

HIGHWAYS:

Defects or obstructions in city streets, see **MUNICIPAL CORPORATIONS**, 12, 13.

1. **HIGHWAYS—ESTABLISHMENT—PRESCRIPTION.** A public highway by prescription over certain lands is not established by proof that, in an open country, a road had been used in the general direction claimed, changes having been made in the travel as the country settled up until the whole section was platted, with streets and cross streets, and at the time of the trial the change in travel was so complete that no part of the original way remained in existence unless over the particular strip, public buildings and dwellings having been built in the road as shown by the earlier maps, portions of it having been fenced, and no part of it having been used as a road for many years. *Dahlstrom v. Anderson*..... 575
2. **HIGHWAYS — PRESCRIPTION—PERMISSIVE USE — EVIDENCE — SUFFICIENCY.** A public road by prescriptive use is not shown where it appears that the road was constructed and used almost exclusively as a logging road under written leases, and no public money was spent on it. *Dennis v. Gary*..... 112
3. **SAME—EVIDENCE—ISSUES AND PROOF.** In an action to declare a road a public highway by prescriptive use, it is admissible, under a general denial, to show that the use was only permissive under a lease. *Dennis v. Gary*..... 112
4. **HIGHWAYS—COUNTY ROADS—ESTABLISHMENT — EVIDENCE — SUFFICIENCY.** The evidence is insufficient to show the establishment of a county road over certain lands, where the county commissioners' record of an order establishing the road was so indefinite that it could not be located with reference to the government subdivisions, and an engineer's projection of the field notes of the survey did not bring the road within 100 feet of the land in question, and there was no proof that the road as opened by the supervisors passed over the land. *Dahlstrom v. Anderson*..... 575
5. **SAME.** Proof of user, in early times, of a road as a public highway, is not proof of establishment of a county road over the tract by county officers. *Dahlstrom v. Anderson*..... 575
6. **HIGHWAYS—OBSTRUCTION—ACTION BY PRIVATE PERSON—SPECIAL DAMAGES.** A mail carrier, whose route was over a bridge negligently destroyed by the defendant, sustains special damage for which he may maintain action, under the common law and under Bal. Code, §§ 5660, 5661, relating to the obstructions of highways, and authorizing actions therefor by any person injuriously affected, where, after destruction of the bridge, he sustained losses by reason of being compelled to deliver the mail by a more circuitous route. *Sholin v. Skamania Boom Co.*..... 303

HOMESTEAD:

Priority of mechanics' lien filed prior to declaration of homestead, see **EXEMPTIONS**.

Interest in as separate or community property, see **HUSBAND AND WIFE**, 1.

Rights in public lands under homestead laws, see **PUBLIC LANDS**, 1.

1. **HOMESTEADS—WHEN ATTACHES—MORTGAGE PRIOR TO DECLARATION—SEPARATE PROPERTY OF HUSBAND.** The selection by a wife of a homestead from the husband's separate property does not defeat the lien of a prior mortgage thereon taken from the husband in good faith; since, under Bal. Code, § 5246, the homestead right attaches only "from and after the time the declaration is filed for record," regardless of occupancy. *Hookway v. Thompson*..... 57

HOMICIDE:

Necessity for proof of motive, see **CRIMINAL LAW**, 6.

Sufficiency of statement of facts, see **INDICTMENT AND INFORMATION**, 2.

Operation and time of taking effect of laws, see **STATUTES**.

1. **HOMICIDE—INFORMATION—SUFFICIENCY.** An information charging that the accused purposely and feloniously, etc., did stab and mortally wound, etc., sufficiently alleges that he did the act purposely and feloniously. *State v. Arata*..... 185
2. **HOMICIDE—DYING DECLARATION—OPINION EVIDENCE.** A witness may give his opinion as to whether the deceased in making a dying declaration apparently believed that she could not live. *State v. Quinn* 295
3. **SAME—ADMISSIBILITY OF DECLARATION.** A dying declaration is admissible where the deceased had received a mortal wound and had been informed by the attending physician that she must die, and the statement was drawn by the prosecuting attorney, read in her presence, and assented to and signed in the presence of witnesses. *State v. Quinn*..... 295
4. **HOMICIDE—EVIDENCE—THREATS—REMOTENESS.** Evidence that the accused, two years before the homicide, had, in the presence of the deceased, threatened to shoot the deceased, is competent and not inadmissible as too remote. *State v. Quinn*..... 295
5. **HOMICIDE—TRIAL—INSTRUCTIONS—DELIBERATION.** Upon a prosecution for murder in the first degree, it is error to instruct that there need be no appreciable space of time for deliberation and premeditation. *State v. Arata*..... 185
6. **HOMICIDE—INSTRUCTIONS—DEFINING DEGREES OF OFFENSE.** An instruction defining the degrees of murder and manslaughter in the language of the statute is sufficient; since the statute bears no technical terms and is plain and unambiguous. *State v. Quinn*. 295

HOMICIDE—CONTINUED.

7. **HOMICIDE—APPEAL—INSTRUCTIONS—HARMLESS ERROR.** Where the defendant was guilty of murder either in the first or second degree, an unwarranted instruction on the subject of manslaughter is error favorable to the defendant of which he cannot complain. *State v. Quinn* 295

HUSBAND AND WIFE:

Divorce and judicial separation, see **DIVORCE**.

Effect of prior mortgage on wife's homestead selection, see **HOME-STEADS**.

Marriage and annulment thereof, see **MARRIAGE**.

Competency as witnesses, see **WITNESSES**, 2, 3.

1. **HUSBAND AND WIFE—COMMUNITY PROPERTY—DESCENT AND DISTRIBUTION—PUBLIC LANDS—HOMESTEAD.** A homestead, patent for which was issued to a married man, is community property, and upon the subsequent death of the wife, leaving one child, an undivided one-half interest descends to the child. *Krieg v. Lewis*..... 196
2. **HUSBAND AND WIFE—COMMUNITY OR SEPARATE PROPERTY.** Property acquired by the husband prior to his marriage, and to which neither the plaintiff nor the community contributed, is the separate property of the husband. *Loeper v. Loeper*..... 647
3. **HUSBAND AND WIFE—COMMUNITY PROPERTY—ACQUISITION AFTER DIVORCE.** Land settled upon by a husband and wife who were trespassers and without claim of right or title or any equity, is not their community property by reason of pending negotiations for its purchase and improvements placed thereon by them; and where, after a decree of divorce which did not mention the property, the land was purchased by the husband, who had remained in possession, the same is his separate property, notwithstanding the purchase was made on the terms of the negotiations pending before divorce, and notwithstanding that, in an ejectment suit, the husband by his answer had made a claim of right antedating the divorce decree. *Wingard v. Wingard*..... 389
4. **SAME—ESTOPPEL—ADMISSION IN PLEADING—PARTIES AFFECTED.** The wife, having no equity, could not avail herself of any admissions by the husband in the ejectment suit. *Wingard v. Wingard*.... 389

HYPOTHETICAL QUESTIONS:

In examination of expert witnesses, see **EVIDENCE**, 14.

IDENTIFICATION:

Of forged check, see **FORGERY**.

IMPEACHMENT:

Recall of city councilman, see **MUNICIPAL CORPORATIONS**, 1-5.

Of verdict by testimony or statements of juror, see **NEW TRIAL**, 4.

Of witness, see **WITNESSES**, 5.

IMPRISONMENT:

See HABEAS CORPUS.

IMPROVEMENTS:

Possession and improvements as part performance to satisfy statute of frauds, see FRAUDS, STATUTE OF, 2.

Public improvements, see MUNICIPAL CORPORATIONS, 6-8.

INCORPORATION:

See CORPORATIONS, 1.

INCUMBRANCES:

Breach of covenants against, see COVENANTS.

INDIANS:

Validity of marriage ceremony performed by Indian chief, see MARRIAGE, 3.

INDICTMENT AND INFORMATION:

See EMBEZZLEMENT, 1; HOMICIDE, 1.

Right of accused to demand copy of charge, see CONSTITUTIONAL LAW.

Indorsement of witnesses on information, see CRIMINAL LAW, 12-14.

Offenses against laws against gambling, see GAMING.

Sale of intoxicating liquor to minor, see INTOXICATING LIQUORS, 2, 7.

Motion to quash quo warranto as demurrer to information, see QUO WARRANTO.

1. INDICTMENT AND INFORMATION—EMBEZZLEMENT BY PUBLIC OFFICER—DISTINCT OFFENSES—CERTAINTY. An information charging a public officer with the embezzlement of fees collected in the sum of \$165, charges but one offense, and is sufficiently direct and certain as regards the crime charged, although the sum represented different fees collected at different times. *State v. Leonard*..... 88
2. INDICTMENT AND INFORMATION—SUFFICIENCY OF STATEMENT OF FACTS. An information for homicide sufficiently describes the manner of killing, under Bal. Code, § 6840, if it states the facts constituting the offense in ordinary language, so that it may be understood by a person of common understanding. *State v. Quinn*.. 295
3. INDICTMENT AND INFORMATION—SUFFICIENCY—TIME OF OFFENSE. An information charging the offense of rape on "a certain day within three years next preceding" the filing of the information, is sufficiently definite as to time, under Bal. Code, § 6845, providing that the precise time need not be stated except where time is a material ingredient in the crime, and that it may be alleged to have been committed at any time within the limitation for prosecution. *State v. Myrberg*..... 384
4. SAME—NAME OF PROSECUTRIX—VARIANCE. It is not a fatal variance to allege a rape upon a child named Frieda, and to prove the

INDICTMENT AND INFORMATION—CONTINUED.

name Valfreda, as given in Holland, where, after coming to this country, the child was generally known as Frieda. *State v. Myrberg* 384

5. INDICTMENT AND INFORMATION—LESSER OFFENSE—CONVICTION—IMPROPER SENTENCE—APPEAL—REMAND. A verdict of guilty upon an information intended to charge the felony of keeping a gambling resort, but only stating facts sufficient to charge the misdemeanor of gambling for gain, is a sufficient conviction of the latter offense; and upon reversing a sentence for the felony, the trial court will be directed to enter the proper sentence for the misdemeanor. *State v. Gaasch* 381

INDORSEMENT:

Of bill of exchange or promissory note, see **BILLS AND NOTES**.
Of names of witnesses on information, see **CRIMINAL LAW**, 12-14.

INFANTS:

See **ADOPTION**.
Custody and support in divorce of parents, see **DIVORCE**, 6.
Sale of intoxicating liquors to minors, see **INTOXICATING LIQUORS**.
Rights, duties and liabilities of parents and children incident to the relation, see **PARENT AND CHILD**.
Waiver of objections to capacity to sue, see **PARTIES**.
Competency as witnesses, see **WITNESSES**, 1.

INFORMATION:

Criminal accusation, see **INDICTMENT AND INFORMATION**.

INJUNCTION:

Restraining malicious structures, see **ADJOINING LANDOWNERS**, 2.
Supersedes of temporary injunction, see **APPEAL AND ERROR**, 11, 12.
By owner or purchaser of tide lands to protect rights therein, see **PUBLIC LANDS**, 2.
Enjoining pollution of waters, see **WATERS AND WATER COURSES**, 1, 2.

INSANE PERSONS:

- Plea of insanity, effect of withdrawal, see **CRIMINAL LAW**, 3.
1. **INSANE PERSONS—EVIDENCE—SUFFICIENCY**. The evidence is insufficient to show that one who had been an inmate of an insane asylum for a few months, and at times somewhat deranged, was insane, where it appears that for over three years before the commencement of the action, she had held a responsible position of trust as a housekeeper, and witnesses testified to her complete sanity during such time. *Huntington v. Love* 674

INSOLVENCY:

Of corporation, see **CORPORATIONS**, 13-16.

INSPECTION:

Review of order for inspection of papers, see **CERTIORARI**, 2.
Of writings, see **DISCOVERY**.

INSTRUCTIONS:

Review as dependent on presentation of objection in lower court, see **APPEAL AND ERROR**, 8.
In criminal prosecutions, see **CRIMINAL LAW**, 10, 11, 20; **HOMICIDE**, 5-7.
In civil actions, see **TRIAL**.

INSULTS:

Nominal or compensatory damages, see **DAMAGES**, 1.

INSURANCE:

Liability of mortgagee for loss upon breach of agreement to secure insurance, see **CONTRACTS**, 2.

1. **INSURANCE—MARINE INSURANCE—POLICY—CONSTRUCTION.** A general contract of insurance of shipments by rail within the limits of the United States and Canada, and shipments by steamers navigating coastwise and inland waters of the United States, covers a shipment from San Francisco to Bellingham and Seattle, by a steamer driven from her course by stress of weather while navigating such waters, and lost by perils of the sea, although the ship intended to stop en route at Victoria, a foreign port; since the policy was manifestly intended to cover losses occurring in certain well defined geographical limits. *Stone v. Insurance Co. of North America*..... 427
2. **INSURANCE—FIRE INSURANCE—POLICY—WARRANTIES—SPRINKLER SYSTEM.** A "sprinkler clause" in a fire insurance policy, providing for an automatic sprinkler system and due diligence in maintaining the same in good working order, is a "warranty" where the rate of premium was approximately fifty per cent less than upon the same risk without the sprinkler system, whether the clause was so denominated or not. *Port Blakely Mill Co. v. Springfield Fire and Marine Insurance Co.*..... 681
3. **SAME—BREACH OF WARRANTY—EVIDENCE—SUFFICIENCY.** There is a breach of warranty in an insurance policy for due diligence in maintaining an automatic sprinkler system in a sawmill in good working order, where it was disconnected for nearly three weeks while repairs were being made, and it appears that it was a work of only a few hours to disconnect the system from its old location and move it to its new one. *Port Blakely Mill Co. v. Springfield Fire and Marine Insurance Co.*..... 681
4. **SAME—BREACH OF WARRANTY—EFFECT.** The breach of a warranty in a fire insurance policy to use diligence in maintaining a sprinkler system in good working order, avoids the policy at the time of the breach, and it is immaterial that the system was in good working

INSURANCE—CONTINUED.

order at the time of the fire and that the breach did not contribute to the loss. *Port Blakely Mill Co. v. Springfield Fire and Marine Insurance Co.* 681

INTENT:

To defraud, instructions, see **EMBEZZLEMENT**, 3.

Affecting annexation of chattels to realty, see **FIXTURES**.

INTEREST:

Tender as arresting interest, see **TENDER**, 5.

INTERVENTION:

In foreclosure action, see **MORTGAGES**, 1.

In action to enjoin proceedings for recall of councilman, see **MUNICIPAL CORPORATIONS**, 1.

INTOXICATING LIQUORS:

Setting down drunken passenger, see **CARRIERS**, 9, 12, 13.

Instructions as to intoxication upon issue of plaintiff's contributory negligence, see **NEGLIGENCE**.

1. **INTOXICATING LIQUORS — SALE — STATUTES — CONSTRUCTION.** Bal. Code, § 7313, prohibiting the sale of "intoxicating or spirituous" liquors to minors, does not mean "intoxicating spirituous" liquors; and includes beer as an intoxicating though not a spirituous liquor. *State v. McCormick*..... 469
2. **SAME—SELLING LIQUOR TO MINORS—INFORMATION—DUPLICITY.** A complaint charging the sale of beer to four minors on a certain date is not duplicitous as charging four offenses, the reasonable inference being that the beer was sold jointly to all the parties named at one time and as one transaction. *State v. McCormick*..... 469
3. **INTOXICATING LIQUORS—SALE TO MINORS—EVIDENCE—SUFFICIENCY.** The evidence is sufficient to support a conviction for selling liquor to a minor, although the minor and bartender testified there was no sale, where the state's witness testified that the sale was made in his presence and he knew that it was beer from its appearance and smell, the credibility of the witnesses and weight of the evidence being for the jury. *State v. McCormick*..... 469
4. **SAME—CONSENT OF PARENT—PRIMA FACIE CASE.** In a prosecution for selling liquor to a minor without the "written permission of his parent," evidence by the father that he had not consented is sufficient to make a *prima facie* case, without evidence as to his mother's consent. *State v. McCormick*..... 469
5. **SAME—CONSENT OF PARENT.** The burden of proving parental consent as a justification for the sale of liquor to a minor "without the written permission" of the parents, in violation of Bal. Code, § 7313, is upon the defendant. *State v. McCormick*..... 469

INTOXICATING LIQUORS—CONTINUED.

6. **SAME—ISSUES AND PROOF—INSTRUCTIONS.** Upon a complaint for the sale of liquor to four minors, where the state elected to proceed upon the sale to one only, an instruction authorizing a conviction upon the sale to any one of them, is error, but is without prejudice where immediately followed by an instruction confining the jury to the sale to the one as to whom the election was made, and the trial proceeded, and there was no evidence of any other sale. *State v. McCormick* 469
7. **SAME.** A sale of intoxicating liquors to one minor, will warrant a conviction on an information for a sale to two or more. *State v. McCormick* 469
8. **SAME—SALE MADE "KNOWINGLY."** A sale of liquor to minors is made "knowingly," within Bal. Code, § 7313, if the barkeeper making the sale knew, or by reasonable diligence should have known, that the purchaser was a minor. *State v. McCormick*..... 469

IRRIGATION:

See **WATERS AND WATER COURSES**, 3.

ISSUES:

Conformity of judgment to issues, see **JUDGMENT**, 6.

JEOPARDY:

Former jeopardy bar to prosecution, see **CRIMINAL LAW**, 1, 2.

JOINDER:

In demurrer, see **PLEADING**, 1.

JUDGES:

Prejudice of judge as ground for reversal, see **APPEAL AND ERROR**, 32.
 Conduct of judge in civil trial, see **TRIAL**, 2.

JUDGMENT:

Review in general, see **APPEAL AND ERROR**.
 Appeal from order denying vacation, see **APPEAL AND ERROR**, 4.
 Appealability, see **APPEAL AND ERROR**, 2-4.
 On appeal, see **APPEAL AND ERROR**, 35-37.
 Former decision as law of the case on subsequent appeal, see **APPEAL AND ERROR**, 34.
 Review of decision as involving discretion of court, see **APPEAL AND ERROR**, 24.
 Notice of entry and time for appeal, see **APPEAL AND ERROR**, 9.
 Certiorari to review order vacating, see **CERTIORARI**, 1.
 Review on habeas corpus proceedings, see **HABEAS CORPUS**.
 Accrual of action to enforce, see **LIMITATION OF ACTIONS**, 2.
 Mandamus to enforce payment of corporate judgment, see **MANDAMUS**.

JUDGMENT—CONTINUED.

Personal judgment in foreclosure of maritime lien, see **MARITIME LIENS**, 2.

Alder of defective pleadings by judgment, see **PLEADING**, 7.

In suits to quiet title, see **QUIETING TITLE**.

Necessity for notice of entry, see **TRIAL**, 5.

Mandamus to compel sale of bonds to pay judgment, see **WATERS AND WATER COURSES**, 3.

1. **JUDGMENT—PRESUMPTIONS—PROCESS.** Where the findings of the court show that no service was had except upon parties who had no interest in the land, there is no presumption in support of jurisdiction that another valid service was had upon other necessary parties. *Jones v. Seattle Brick & Tile Co.*..... 166
2. **JUDGMENT—MATTERS AND PARTIES CONCLUDED—PRIVIES.** Where, on a former appeal, it was determined that the whole mortgage debt had become due by a default and declaration of the assignee, and the case was remanded for judgment for the whole debt, it is proper to deny an intervention by one acquiring an interest pending the appeal and seeking a marshaling of the assets on allowing certain credits; since he was a privy bound by the judgment. *Bartlett Estate Co. v. Fairhaven Land Co.*..... 434
3. **JUDGMENTS — MATTERS CONCLUDED — COVENANTS — ACTIONS — DEFENSES.** A judgment against grantees in their unsuccessful attempt to recover possession of the granted premises from tenants of the grantor in possession, does not show that there was no breach of warranty by reason of the unexpired lease, where the court held that there were additional reasons why the plaintiffs could not recover in that action. *O'Connor v. Buos*..... 448
4. **JUDGMENT — BAR — PARTIES CONCLUDED — JOINT DEBTOR BEYOND JURISDICTION.** An unsatisfied judgment in another state against one of two joint makers of a note does not bar another action on the note in this state against the other maker who was beyond the jurisdiction and not a party to the other suit. *Bradley Engineering and Manufacturing Co. v. Heyburn*..... 628
5. **JUDGMENTS—VACATION—MOTION—TIME.** A motion to vacate a judgment for alimony and division of property, because contrary to the stipulation of the parties, is too late when not made within one year after entry of the judgment, as required by Bal. Code, §§ 5155, 5156. *Nelson v. Nelson*..... 571
6. **JUDGMENTS—VALIDITY—PLEADING—PRAYER FOR RELIEF—SCOPE.** A decree is not void as going beyond the specific relief prayed for in the complaint, where the complaint prayed for both specific and general relief, and the decree was within the allegations and prayer for general relief. *Nelson v. Nelson*..... 571
7. **JUDGMENTS — VACATION — APPLICATION — DILIGENCE.** Under Bal. Code, § 5154, requiring diligence in one seeking relief from an op-

JUDGMENT—CONTINUED.

pressive judgment, an application to vacate a judgment for alimony, etc., is properly denied, where nothing was done for ten months after notice of the judgment, the motion was not filed until within three days of the expiration of the year allowed therefor, and there was no excuse or explanation offered for the delay. *Nelson v. Nelson* 571

8. **JUDGMENTS—DEFAULTS—VACATION—EXCUSABLE NEGLECT.** It is not an abuse of discretion to deny a motion to vacate a default judgment on the ground of excusable neglect, where the only excuse was a business trip of the defendant's attorney taking him outside the state, the attorney having had thirteen days in which to prepare a demurrer to a complaint which he claimed failed to state a cause of action, and the answer prepared containing nothing but denials and admissions, and no excuse being offered for not appearing within the thirteen days. *Ramey v. Smith*..... 604

JUDICIAL NOTICE:

In civil actions, see **EVIDENCE**, 2, 3.

JUDICIAL SALES:

Of property of decedent, see **EXECUTORS AND ADMINISTRATORS**.

On foreclosure of mortgage, see **MORTGAGES**, 1-9.

Of property in hands of receivers, see **RECEIVERS**.

Of land for nonpayment of taxes, see **TAXATION**, 3-5.

1. **JUDICIAL SALES—SETTING ASIDE—INADEQUACY.** Slight attending circumstances indicating unfairness are sufficient to sustain the discretion of the court in setting aside a sale for a great inadequacy of price. *Roger v. Whitham*..... 190
2. **SAME—DEFENSES.** A city attorney cannot bid in property at a public sale conducted by him, and assert equitable defenses against the owner. *Roger v. Whitham*..... 190

JURISDICTION:

Appellate jurisdiction, see **APPEAL AND ERROR**.

Of lower court after supersedeas of temporary injunction, see **APPEAL AND ERROR**, 11.

Civil liability for assault, see **ASSAULT AND BATTERY**.

Of court to appoint commissioner for irrigation district, see **COURTS**, 2.

To vacate divorce, see **DIVORCE**, 3.

Election contests, see **ELECTIONS**.

To sell real estate of decedent, see **EXECUTORS AND ADMINISTRATORS**.

Want of jurisdiction as ground for release of prisoner, see **HABEAS CORPUS**.

Validity of judgment dependent on jurisdiction of the person, see **JUDGMENT**, 4.

Publication and service of summons, see **PROCESS**.

Time of rendering decision as affecting jurisdiction, see **TRIAL**, 4.

JURY:

Instructions in criminal prosecutions, see **CRIMINAL LAW**, 10, 11, 20.

Drawing and summoning grand jury, see **GRAND JURY**.

Discharge on habeas corpus for error in drawing and selecting jury, see **HABEAS CORPUS**, 2.

Impeachment of verdict by testimony or statements of jurors, see **NEW TRIAL**, 4.

Instructions in civil actions, see **TRIAL**.

1. **JURY—RIGHT TO JURY TRIAL.** An action to restrain a trespass is of equitable cognizance and without right to a jury trial. *Palmer v. Peterson* 74
2. **JURY—RIGHT TO JURY TRIAL—DEMAND.** It is discretionary to submit the issues to trial by jury, although no demand for a jury was made before trial, as required by Laws 1903, page 50, to avoid a waiver of the right. *Sholin v. Skamania Boom Co.* 303

JUSTICES OF THE PEACE:

Selection of police justice from, see **COURTS**, 1.

JUSTIFICATION:

For assault, see **ASSAULT AND BATTERY**.

KNOWLEDGE:

Sale of liquors to minors made "knowingly," see **INTOXICATING LIQUORS**, 8.

LACHES:

As defense in proceedings to condemn land, see **EMINENT DOMAIN**, 7.

Effect on equity, see **EQUITY**.

LANDLORD AND TENANT:

Unexpired lease as encumbrance, see **COVENANTS**.

Right of tenant to condemnation money, see **EMINENT DOMAIN**, 13.

Requirements of statute of frauds as to lease, see **FRAUDS, STATUTE OF**, 1, 2.

Conclusiveness of matters in action by lessees on covenant, see **JUDGMENT**, 3.

Remedies of city for nonpayment of rent reserved on granting franchise to maintain wharf, see **MUNICIPAL CORPORATIONS**, 11.

1. **LANDLORD AND TENANT—LEASE—ASSIGNMENT—RESERVATIONS.** The assignee of a lease is not entitled to the use of a cottage which was expressly excepted in the assignment, in the absence of fraud, deceit or mutual mistake in reserving the cottage. *Johnson v. Zufeldt*. 5
2. **LANDLORD AND TENANT—LEASES—PARTIAL ASSIGNMENT—RENT—PROPORTIONAL SHARES.** Upon a partial assignment of a lease, which contained no reference to the share of the rent which the assignee was to pay, the law implies an agreement to pay a proportional share only, according to the value of the respective interests, and upon

LANDLORD AND TENANT—CONTINUED.

payment of the entire rent by the assignee, he is entitled to recover from the assignor the proportional part admitted by the pleadings to be chargeable to the interest of the assignor. *Johnson v. Zufeldt* 5

3. **LANDLORD AND TENANT—LEASE—ASSIGNMENT—WITHOUT CONSENT—DAMAGES—RIGHTS OF ASSIGNEE—WAIVER OF FORFEITURE.** Damages cannot be recovered by the assignees of a lease by reason of the assignor's breach of her agreement to procure the written consent of the landlord, where the assignees were not disturbed in their possession and the landlord waived a forfeiture of the lease by accepting rent from the assignee, after notice of the assignment. *Batley v. Dewalt* 431

4. **SAME—LEASE—ASSIGNMENT WITHOUT CONSENT—WAIVER—RECEIPT OF RENTS.** A landlord's acceptance of rent from assignees of the lease, after notice of the assignment, waives the right to forfeit the lease for assignment without the landlord's consent, although receipt for the rent was given in the name of the original lessees. *Batley v. Dewalt* 431

LANDS:

See PUBLIC LANDS.

LARCENY:

Larceny of goods by one having possession thereof, see EMBEZZLEMENT.

LAW OF THE CASE:

See APPEAL AND ERROR, 20, 34.

LEASES:

See LANDLORD AND TENANT.

LIBEL AND SLANDER:

1. **LIBEL AND SLANDER—WORDS IMPUTING CRIME INVOLVING MORAL TURPITUDE—CONSTRUCTION—SUBMISSION TO JURY.** Defendant's statement that plaintiff left his wife in the east on her deathbed and came west with a whore, is capable of a construction imputing the criminal offense of living in a state of adultery and involving moral turpitude; and it is accordingly not error, as against the defendant, to submit to the jury the question whether it did impute such crime. *Jeffery v. Gill* 586
2. **LIBEL AND SLANDER—SLANDER OF TITLE—SPECIAL DAMAGES—ATTORNEY'S FEES.** In an action for slander of title, only special damages can be recovered, and they must be pleaded and proved; and a claim for an attorney's fee in the current action is not recoverable, either as damages or costs, other than statutory. *McGuinness v. Hargiss* 162

LICENSES:

Annual corporation tax, see **CORPORATIONS**, 1.

LIENS:

Equitable rights as against lien claimants not parties to proceedings, see **EMINENT DOMAIN**, 12.

Priority of mechanics' lien, see **EXEMPTIONS**.

Maritime liens, see **MARITIME LIENS**.

Liens of mechanics and materialmen, see **MECHANICS' LIENS**.

Mortgage liens, see **MORTGAGES**.

LIMITATION:

Of amount affecting jurisdiction of courts, see **APPEAL AND ERROR**, 2.

LIMITATION OF ACTIONS:

See **TRESPASS**.

Time for taking appeal or other proceeding for review, see **APPEAL AND ERROR**, 9.

Of proceedings by certiorari, see **CERTIORARI**, 3.

Laches, see **EQUITY**.

1. **LIMITATION OF ACTIONS—TRESPASS TO REAL PROPERTY—WHAT CONSTITUTES.** An action by tenants of a building for damages resulting from tunneling under the property is not an action of trespass, within the three-year statute of limitations, Bal. Code, § 4800, where the damages were largely consequential for injury to business and loss of profits, and by reason of cutting off access; and must be commenced within two years within the provisions of Bal. Code, § 4805, for actions not otherwise provided for. *Welch v. Seattle and Montana R. Co.*..... 97
2. **LIMITATION OF ACTIONS—JUDGMENTS—ACTIONS TO ENFORCE—TIME OF ACCRUAL—MANDAMUS TO PAY JUDGMENT.** An action for a mandamus to compel an irrigation district to sell bonds to pay a judgment does not arise until the judgment is obtained and the refusal of the district to satisfy the same. *State ex rel. Dyer v. Middle Kittitas Irrigation District*..... 488

LIQUORS:

See **INTOXICATING LIQUORS**.

LOCATION:

Of mining claim, see **MINES AND MINERALS**.

LODES:

See **MINES AND MINERALS**, 1.

LOOK AND LISTEN:

Duty of person crossing street car track, see **STREET RAILROADS**.

LOST INSTRUMENTS:

Secondary evidence of contents, see EVIDENCE, 4.

1. LOST INSTRUMENTS—EVIDENCE TO ESTABLISH—SUFFICIENCY. The proof must be clear and positive to establish the contents of a lost instrument and it is not sufficient that a witness state his recollection of its legal effect, if he cannot give even the substance of its language. *Scurry v. Seattle*..... 1

MACHINERY:

See FIXTURES.

Liability of employer for defects, see MASTER AND SERVANT, 1-3, 8, 11-13.

MALICIOUS STRUCTURES:

Violation of building restrictions, see ADJOINING LANDOWNERS.

MANDAMUS:

To compel striking of corporate name from records, see CORPORATIONS, 1.

Accrual of action to enforce sale of bonds to pay judgment, see LIMITATION OF ACTIONS, 2.

Compelling public service by water company, see WATERS AND WATER COURSES, 4, 5.

To compel irrigation district to pay judgment, see WATERS AND WATER COURSES, 3.

1. MANDAMUS—TO ENFORCE PAYMENT OF CORPORATE JUDGMENT—NATURE OF REMEDY—ELECTION OF REMEDIES. The recovery of a money judgment against an irrigation district is not an election of remedies or a splitting of causes of action, so as to bar a mandamus proceeding to compel the sale of bonds to pay a disputed claim, on the theory that mandamus could have been maintained in the first instance, where it was not alleged in the original action that the district had no property subject to execution or that the officers would refuse to satisfy the judgment; the presumption being that the officers would perform their duty to pay the judgment, and mandamus in such case being in the nature of a remedy in aid of execution rather than an original cause of action. *State ex rel. Dyer v. Middle Kittitas Irrigation District*..... 488

MARINE INSURANCE:

See INSURANCE, 1.

MARITIME LIENS:

1. MARITIME LIENS—FOR WORK ON VESSEL—SHIPPING—"TACKLE," WHAT IS. The work of repairing a gasoline engine belonging to A., at A's request, and installing it in a boat belonging to M., with M's consent, for the purpose of trial and with a view to a possible sale of the engine to M., is not work or labor upon a "vessel, her tackle,

MARITIME LIENS—CONTINUED.

apparel," etc., within Bal. Code, § 5953, whereby the laborer could acquire any lien upon the boat or engine, he having knowledge of the aforesaid ownership and purposes, and the contemplated sale not taking place on account of the rejection of the engine by M. and its removal from the boat by A. *Thompson v. Allen*..... 582

2. **MARITIME LIENS — FORECLOSURE — FAILURE OF LIEN — PERSONAL JUDGMENT.** In an action to foreclose a lien on the tackle, apparel, etc., of a vessel, on the failure of the lien, there can be no personal judgment against the defendant owner, where he did not waive his rights in that respect, and contested the claim for a lien and for personal judgment against him, not only on the merits, but also by reason of the form of the action. *Thompson v. Allen*..... 582

MARRIAGE:

See BREACH OF MARRIAGE PROMISE.

Incompetency of surviving wife to testify as to marriage, see WITNESSES, 4.

1. **MARRIAGE—COHABITATION—PRESUMPTION.** While a common law marriage is not valid in this state, cohabitation and reputation raises a rebuttable presumption of a valid ceremonial marriage. *Weatherall v. Weatherall*..... 344
2. **MARRIAGE—COHABITATION AND REPUTATION — EVIDENCE — ADMISSIBILITY.** Evidence of cohabitation between a white man and an Indian woman, and of reputation and declarations of the husband that they were married, and of the manner in which they lived together and the opinion of friends and neighbors, is admissible to raise the presumption of a ceremonial marriage, and to supplement evidence of a marriage ceremony performed by an Indian chief assuming to act as a minister. *Weatherall v. Weatherall*..... 344
3. **MARRIAGE—CEREMONY — EVIDENCE — SUFFICIENCY — AUTHORITY OF MINISTER—STATUTES AS TO VALIDITY.** A marriage ceremony wherein a white man and an Indian woman agreed to take each other as husband and wife, performed by an Indian chief who was a Christian of the Presbyterian faith, and who assumed to be a minister, and to have authority to unite people in marriage, is within Bal. Code, §§ 4470, 4471, providing that no particular form is necessary other than the assent to take each other as husband and wife, and that the validity thereof shall not be affected on account of any want of power or authority of such person, if the marriage is consummated with a belief on the part of either of the persons that they have been lawfully married. *Weatherall v. Weatherall* 344

MARRIED WOMEN:

See HUSBAND AND WIFE.

MASTER AND SERVANT:

Liability of carrier for insults to passenger by employee, see **CARRIERS**, 6, 7.

Release of liability of master, see **RELEASE**.

1. **MASTER AND SERVANT—APPLIANCES—INSTRUCTIONS.** An instruction that the master is bound to keep the machinery in good or "sound" repair is not erroneous. *Hale v. Crown Columbia Pulp and Paper Co.* 236
2. **MASTER AND SERVANT—NEGLIGENCE OF MASTER—DEFECTIVE APPLIANCE—EVIDENCE—SUFFICIENCY.** There is sufficient evidence of negligence in the use of a pneumatic rivet hammer used in structural iron work without a wire attached to the rivet set to prevent the set from being thrown from the hammer when the air was accidentally applied while the hammer was not in place, where it appears that the same was an effective safety device, in common use, easily attached without lessening the effectiveness of the hammer, and would have prevented the accident. *Philbin v. Columbia & Puget Sound R. Co.*..... 610
3. **MASTER AND SERVANT—INJURY TO SERVANT—PROXIMATE CAUSE.** The wet and slippery condition of the floor of a mill about the rigging to haul logs from the pond, which caused the plaintiff to slip and fall, is not the proximate cause of the injury, where in falling his hand struck a stranded wire cable and the wire pierced his glove and carried him around the drum; but the defective condition of the cable was the cause. *McKean v. Chappell*..... 690
4. **SAME—DETAILS OF WORK.** It is not error to refuse an instruction that the master was not liable for the details of the work where there was no basis for it in the evidence. *Hale v. Crown Columbia Pulp and Paper Co.*..... 236
5. **MASTER AND SERVANT—FELLOW SERVANTS—DEPARTMENTS.** A brakeman on a tram car is not in the same department with, and is not a fellow servant of, a trackman engaged in putting plates on the steel of the tram rails. *Hale v. Crown Columbia Pulp and Paper Co.* 236
6. **SAME.** Persons engaged in a common employment and so situated as to have opportunities to use precautions against each other's negligence are fellow servants. *Hale v. Crown Columbia Pulp and Paper Co.* 236
7. **SAME—FELLOW SERVANTS.** In such a case, if the negligent rate of speed was the fault of the motorman, it was the act of a fellow servant, precluding any recovery by the conductor. *Craig v. Great Northern R. Co.*..... 640
8. **MASTER AND SERVANT—ASSUMPTION OF RISKS—PROMISE TO REPAIR—VICE PRINCIPALS—EVIDENCE—SUFFICIENCY.** A timekeeper or

MASTER AND SERVANT—CONTINUED.

clerk, who gave a promise to repair a chain, during the absence of the general foreman, was not a superintendent or vice principal as to the plaintiff, a stone mason, who was injured by the breaking of the chain, where it appears from plaintiff's evidence that one A. was the general foreman, that when A. was absent there was no one to give orders to the plaintiff, who was foreman of his derrick crew, although he stated that when A. was away the clerk took his place and was "timekeeper and foreman the way I called him," and where the other evidence showed that the clerk was merely a timekeeper in charge of the accounts and supplies and had no part in the work nor any authority over it or the tools, that when a chain was broken (which happened frequently) the men got a new one or repairs from the blacksmith or used a cold-shut, on their own motion or by direction of the plaintiff, and that plaintiff and the clerk each had authority to hire men in the absence of the general foreman; hence the plaintiff cannot avoid the assumption of risks from the use of a defective chain upon the clerk's promise to repair the same. *Wolk v. Smith*..... 33

9. SAME—ASSUMPTION OF RISKS—CONTRIBUTORY NEGLIGENCE—INEXPERIENCED EMPLOYEES. Whether an apprentice and helper assumed the risk in assisting a foreman who was working with a pneumatic rivet hammer without a wire attached to the rivet set as a safety appliance in case of accidental application of the air, or was guilty of contributory negligence, is for the jury, where it appears that he was twenty years of age, had never worked with a pneumatic hammer before, and did not know that the wire should be used. *Philbin v. Columbia & Puget Sound R. Co.*..... 610
10. SAME—CONTRIBUTORY NEGLIGENCE—METHODS OF WORK—TWO WAYS—INSTRUCTIONS. It is not error to refuse to give an instruction upon the subject of contributory negligence in adopting an unsafe method of doing the work, where there was no evidence that there was a choice of ways. *Hale v. Crown Columbia Pulp and Paper Co.* 236
11. MASTER AND SERVANT—CONTRIBUTORY NEGLIGENCE—APPARENT DANGERS—DUTY OF LINEMAN TO OBSERVE DEFECTS. An experienced lineman employed in the capacity of a "troubleman" to remedy all kinds of trouble on the line, and in charge of the operating department out on the line, who was injured by a fall from a telephone pole by reason of a bent iron step which caused his foot to slip off, is guilty of contributory negligence which was the proximate cause of his injury, and it is error to refuse a nonsuit, where it appears from his testimony that the right way to ascend a pole is to use the hands and feet on each step in the ascent, the accident occurred in the open on a clear day, the defect was apparent at a glance, and the plaintiff made no inspection and did not observe the defect even in grasping it in his hand or in passing, and he was in a better

MASTER AND SERVANT—CONTINUED.

- position to see it than any one else, and where it was established that it was his duty to inspect the construction and repair, and correct or report if anything was wrong. *Goddard v. Interstate Telephone Co.* 536
12. MASTER AND SERVANT—NEGLIGENCE OF MASTER—DEFECTIVE BRAKES—PROXIMATE CAUSE—CONTRIBUTORY NEGLIGENCE. The conductor of a street car, injured in a collision at a railroad crossing, is guilty of contributory negligence which is the proximate cause of the accident, where it appears that he and the motorman knew that the brakes on a large suburban car were out of order and would not stop the car readily, that he permitted the motorman to approach the railroad crossing at a speed of thirty miles an hour until within seventy-five feet of the crossing without making any effort to reduce the speed, although he had power to control the car by signals, and knew the location, in violation of the rule against crossing without coming to a stop and going ahead to see if the crossing was clear. *Craig v. Great Northern R. Co.*..... 640
13. MASTER AND SERVANT—NEGLIGENCE—CONTRIBUTORY NEGLIGENCE—QUESTION FOR JURY. The question of the master's negligence and of the servant's contributory negligence is for the jury, where the accident was due to a defective brake, and he was struck by a wire cable while working at the place and in the manner directed, without warning of the danger. *Hale v. Crown Columbia Pulp and Paper Co.* 236
14. MASTER AND SERVANT—CONTRIBUTORY NEGLIGENCE—QUESTION FOR JURY. The contributory negligence of the plaintiff, the operator of the rigging for hauling logs from the pond to the mill, is for the jury, where the plaintiff's witnesses were positive that he performed his duties in the proper and customary manner. *McKean v. Chappell*..... 690

MECHANICS' LIENS:

Priority over homestead exemption, see EXEMPTIONS.

Liens for repair of vessels, see MARITIME LIENS.

1. MECHANICS' LIENS—BONDS ON PUBLIC WORK—NOTICE—FORM. A notice by a materialman to a surety on the bond of a contractor on a public building, stating a claim *against the building* for material furnished to the principal contractor, complies, in substance, with Laws 1899, p. 172, § 1, which requires the notice to state claims *against the bond*. *Cascade Lumber Co. v. Aetna Indemnity Co.* 503
2. SAME—TIME FOR FILING—STATUTES—CONSTRUCTION. Under Laws 1899, p. 172, § 1, providing that no action shall be commenced by materialmen against the surety on the bond of a contractor on public work "unless within thirty days from and after the completion of the contract and an acceptance of the work" notice be filed,

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the claimant need not wait until the work is completed and accepted before filing notice of claim, where the contract was abandoned; nor need the notice be filed within thirty days after abandonment by the contractor where it was not completed or accepted; as the statute only fixes the time after which notice cannot be given. *Cascade Lumber Co. v. Aetna Indemnity Co.*..... 503

MEMORANDA:

Required by statute of frauds, see **FRAUDS, STATUTE OF**, 4.

MENTAL SUFFERING:

As element of damages, see **DAMAGES**, 2.

METHOD OF SALE:

Execution sales on foreclosure of mortgage, see **MORTGAGES**, 3-9.

METHOD OF WORK:

Adoption of unsafe method by servant, see **MASTER AND SERVANT**, 10.

MINES AND MINERALS:

Mining machinery not fixture, see **FIXTURES**.

1. **MINES AND MINERALS—LOCATION NOTICES—SUFFICIENT STATE REGULATIONS.** A mineral relocation notice is insufficient and inadmissible in evidence under Laws 1899, p. 69, § 1, where it fails to state the length claimed on each side of the discovery, the general course of the lode, or to identify the claim by reference to natural monuments as required by that act; since compliance with state laws not inconsistent with the Federal statutes is essential to a valid relocation. *Knutson v. Fredlund*..... 634
2. **SAME—ACTION TO RECOVER POSSESSION—DEFENSES—AMENDED NOTICES.** In an action to recover possession of a mining claim, the defendant cannot base any right upon amended relocation notices posted by him after the commencement of the action. *Knutson v. Fredlund* 634
3. **SAME—ASSESSMENT WORK—FORFEITURE—SUPERIOR TITLE.** In an action to recover possession of a mining claim, a defendant holding under an invalid relocation is not entitled to attack plaintiff's title by reason of his failure to do assessment work, as such failure did not work a forfeiture until valid relocation was made. *Knutson v. Fredlund* 634
4. **SAME—RESUMPTION OF WORK—FORFEITURE.** A resumption of assessment work prior to the lawful inception of intervening rights, saves a forfeiture for failure to do the required work. *Knutson v. Fredlund* 634

MINORS:

Selling liquor to minors, see **INTOXICATING LIQUORS**.

MISCONDUCT:

- Of counsel, see TRIAL, 3.
- Of judge at trial, see TRIAL, 2.

MISREPRESENTATION:

- By corporation in sale of shares, see CORPORATIONS, 5.
- Affecting validity of contract for sale of land, see VENDOR AND PURCHASER, 1.

MISTAKE:

- Fraud or mistake in settlement, see COMPROMISE AND SETTLEMENT.
- Affecting right to specific performance of contract, see SPECIFIC PERFORMANCE, 1.

MODIFICATION:

- Of contract of sale, see SALES, 5, 6.
- Of contract for sale of land, see VENDOR AND PURCHASER, 7.

MONEY RECEIVED:

- Recovery of price paid for land, see VENDOR AND PURCHASER, 7, 10.

MOOT QUESTIONS:

- Review on appeal, see APPEAL AND ERROR, 1.

MORTGAGES:

- Consideration for agreement by mortgagee to secure insurance, see CONTRACTS, 2.
- By corporations, see CORPORATIONS, 15, 16.
- Right to condemnation money as between parties to mortgage, see EMINENT DOMAIN, 12.
- Parol evidence to vary, see EVIDENCE, 9.
- Deficiency sale, see EXECUTORS AND ADMINISTRATORS, 1.
- Homestead property, see HOMESTEAD.
- Conclusiveness as against person acquiring interest pending appeal, see JUDGMENT, 2.
- Subrogation to rights of mortgagee on payment of mortgage, see SUBROGATION.
- Tender of mortgage debt, see TENDER.

1. MORTGAGES — FORECLOSURE — INTERVENTION — SUBROGATION. The owner of a half interest in mortgaged property, acquired after the commencement of suit to foreclose the mortgage, has a right to intervene in the foreclosure suit and make a tender with a view of being subrogated to the rights of the mortgagee against his co-owners. *Murray v. O'Brien*..... 361
2. MORTGAGES—FORECLOSURE—VACATION OF SALE — ESTOPPEL — SATISFACTION AS EQUITABLE ASSIGNMENT — EQUITY — DOING EQUITY. A judgment creditor of an insolvent corporation, who stood by and permitted a purchaser to acquire its rights and thereafter expend

MORTGAGES—CONTINUED.

money in improvements, cannot ask the vacation of a foreclosure sale under a prior *bona fide* mortgage, so as to establish a prior lien in his favor, without offering to pay the mortgage; since the mortgage would continue as a valid lien equitably assigned to the purchaser at the foreclosure sale, which sale would not satisfy the mortgage. *Boyes v. Turk Mining Co.*..... 515

3. MORTGAGES—FORECLOSURE—EXECUTION SALES—METHOD. Bal. Code, § 5288, providing that sales on execution shall be by the acre, is directory, and does not require land to be sold one acre at a time; one bid upon a tract of a certain number of acres will be construed as a bid at so much per acre, and is not a substantial irregularity. *Bartlett Estate Co. v. Fairhaven Land Co.*..... 437
4. SAME—MODE OF SALE—PERSONS ENTITLED TO BID ON PARCEL. Laws 1899, p. 87, § 4, providing that real property shall be sold under execution separately when a portion is claimed by a third person and requires it to be sold separately, refers to persons claiming adversely to the mortgagor or mortgagee, and not to persons acquiring an interest *pendente lite* with notice of the suit. *Bartlett Estate Co. v. Fairhaven Land Co.*..... 437
5. SAME—WAIVER OF RIGHT. Persons attending a foreclosure sale, who had made a written request for the separate sale of portions of the mortgaged property, waive their right to a separate sale by remaining silent at the sale when the sheriff asked "if there was any particular piece" desired to be sold separately; notwithstanding that the sheriff had replied to the written request in writing stating that he would sell as directed by the decree, as the same was not such a denial of the request as would excuse attendance and oral demand at the sale. *Bartlett Estate Co. v. Fairhaven Land Co.*.. 437
6. SAME—METHOD OF SALE—DETERMINATION BY COURT—CONFIRMATION—RIGHT TO OBJECT. Where a decree of foreclosure directed that the various tracts of land be sold in parcels as described in the mortgage, it must be presumed that the court determined that such method of sale would bring the highest price within Laws 1899, p. 87, § 4, directing a sale "separately or otherwise as is likely to bring the highest price"; and no objection being made to the judgment, objection cannot be made to confirmation by parties or privies because the sheriff did not sell in smaller tracts. *Bartlett Estate Co. v. Fairhaven Land Co.*..... 437
7. SAME—SEPARATE PARCELS—APPURTENANCES. Where a mortgage and decree described certain tracts of upland by metes and bounds, "together with the leases" of the harbor area fronting thereon, the leases are appurtenant to the upland, and may be sold as one tract with the abutting upland. *Bartlett Estate Co. v. Fairhaven Land Co.* 437

MORTGAGES—CONTINUED.

8. SAME—DISCRETION OF SHERIFF—IRREGULARITIES. Where no request is made for the sale of mortgaged premises in separate tracts, and the decree ordered the property sold in parcels as described in the mortgage, it is not a substantial irregularity for the sheriff in his discretion to sell several of the tracts in one parcel. *Bartlett Estate Co. v. Fairhaven Land Co.*..... 437
9. SAME—SALES FOR CASH—COMPETITION. Under Bal. Code, § 5291, requiring sales of real estate under execution to be sold to the “highest bidder who shall forthwith pay the bid to the officer” the announcement at a sale, advertised to be for cash, that the sheriff would not take checks or anything of that kind is not unfair as preventing competitive bids. *Bartlett Estate Co. v. Fairhaven Land Co.* 437
10. MORTGAGES—BILLS AND NOTES—SECURITY—APPLICATION. Under the negotiable instruments act, a holder for value of notes secured by mortgage can apply the proceeds of foreclosure to the payment of any one or all of the notes without observing the equities existing between joint makers who were all primarily liable thereon. *Bradley Engineering and Manufacturing Co. v. Heyburn*..... 628
11. MORTGAGES—TENDER—EFFECT—DISCHARGE OF LIEN—KEEPING TENDER GOOD. Tender of the amount due on a mortgage before law day, extended by construction until suit commenced, discharges the lien of the mortgage, and the tender need not be kept good by bringing it into court. *Murray v. O'Brien*..... 361
12. SAME—“FORECLOSURE” AND “LAW DAY.” In the rule for the discharge of a mortgage by tender before law day or at any time before foreclosure and sale, “foreclosure” and “law day” are synonymous terms, and mean the “institution of the suit” as contradistinguished from the “law day” of the common law; and “law day” does not, as to a tender *inter partes*, extend to the day of sale. *Murray v. O'Brien* 361
13. SAME—DISCHARGE OF LIEN BY TENDER—TO WHOM AVAILABLE. The rule that a tender discharges the lien of a mortgage does not avail one who is seeking affirmative relief and asking the cancellation of the debt. *Murray v. O'Brien*..... 361

MOTIONS:

To open or set aside default judgment, see JUDGMENT, 5, 7, 8.

Motion to quash *quo warranto* as demurrer to information, see *Quo Warranto*.

MOTIVE:

Necessity for proof of in prosecution for homicide, see CRIMINAL LAW, 6.

MUNICIPAL CORPORATIONS:

Harmless error in refusal to strike out excessive claims against city after verdict, see **APPEAL AND ERROR**, 30.

Inadequate and excessive damages, see **DAMAGES**, 2.

Water supply, see **WATERS AND WATER COURSES**, 4, 5.

Power of city to authorize construction of wharves, see **WHARVES**.

1. **MUNICIPAL CORPORATIONS—OFFICERS—ACTIONS — PARTIES — INTERVENTION—TAXPAYERS.** In an action by a councilman to enjoin the city clerk from certifying to an elector's petition for his recall, a taxpayer has no interest entitling him to intervene under Bal. Code, § 4846, it not being alleged that the clerk would not defend the action. *Hilzinger v. Gillman*..... 228
2. **MUNICIPAL CORPORATIONS—CHARTER—CONSTRUCTION—RECALL AND LEGISLATION.** There is no conflict between a provision of a city charter contemplating a recall of a councilman, when his action is not responsive to the will of the majority, and another section providing for his removal by the city council for specified causes. *Hilzinger v. Gillman*..... 228
3. **SAME—RECALL PROVISION—AUTHORITY FOR.** A provision in a city charter adopted by a city of the first class under Const., art. 11, § 10, for the recall of a city councilman, is authorized by Bal. Code, § 740, providing that the city council shall have the powers, and shall be elected at the times, in the manner, and for the terms prescribed in the charter. *Hilzinger v. Gillman*..... 228
4. **SAME—COUNCILMAN—TERM OF OFFICE—RECALL.** A councilman elected for a definite term fixed by the city charter, which also contains a provision for his recall by a vote of the electors of his ward, is elected for a fixed term, subject to a condition subsequent. *Hilzinger v. Gillman*..... 228
5. **SAME—TERM OF OFFICE—RECALL—IMPEACHMENT.** Const., art. 5, § 3, providing that all officers shall be subject to removal for misconduct in office, has no application to a removal by the recall provided for in the city charter, and the advisability of such recall is a political and not a legal question. *Hilzinger v. Gillman*..... 228
6. **MUNICIPAL CORPORATIONS — ASSESSMENTS — SALES — PURCHASE BY CITY ATTORNEY—VALIDITY.** A city assessment foreclosure and sale, without notice to the owner, is void when conducted by the city attorney, who made no diligent effort to ascertain the name or address of the owner, and who has, through the instrumentality of a third person, bid in the property at a grossly inadequate price. *Roger v. Whitham*..... 190
7. **SAME.** A city attorney is charged as a trustee, as well for the owner of property sought to be charged with the lien of a special assessment as for the city, and is bound to perform his full duty to each. *Roger v. Whitham*..... 190

MUNICIPAL CORPORATIONS—CONTINUED.

8. MUNICIPAL CORPORATIONS—IMPROVEMENTS—ASSESSMENTS—REBATES
ORDINANCES—CONSTRUCTION. A “rebate” allowed to “owners of the
property” assessed for the pavement of a street, required by an
ordinance to be paid into the city treasury by a street railway com-
pany to cover the cost of paving between tracks subsequently laid
in the street, refers to the owners at the time the assessment was
paid, under a strict construction of the statute; and a subsequent
purchaser of a lot has no interest in the rebate. *Savage-Scofield
Co. v. Tacoma*..... 457
9. MUNICIPAL CORPORATIONS — ORDINANCES — FRANCHISES—WHARVES.
An ordinance granting a franchise to maintain a wharf commencing
at the foot of a street and extending along the line of the street
extended into tide water, is not a franchise to use a public street.
State ex rel. Port Angeles v. Morse..... 654
10. MUNICIPAL CORPORATIONS—CHARTER—POWERS—FRANCHISES. Bal.
Code, § 938, authorizing cities of the third class to sell, dispose of
or rent “water front” refers only to water front property to which
the city has title, and not to water front of which it has control as
a public street. *State ex rel. Port Angeles v. Morse*..... 654
11. MUNICIPAL CORPORATIONS — ORDINANCES — FRANCHISES — LEASE —
REMEDIES—QUO WARRANTO. An ordinance purporting to grant a
franchise to maintain a wharf on city water front property for a
term of years, reserving rent and right of reentry, is a lease and not
a franchise, and the remedy of the city for nonpayment of rent is
by an ordinary action, and not by quo warranto for usurpation of
a franchise. *State ex rel. Port Angeles v. Morse*..... 654
12. MUNICIPAL CORPORATIONS—DEFECT IN STREETS—COMPLAINT. In an
action against a city for personal injuries sustained in running upon
an obstruction in a street, the complaint need not state what officer
was negligent. *Dunkin v. Hoquiam*..... 47
13. MUNICIPAL CORPORATIONS—STREETS—OBSTRUCTIONS—NEGLIGENCE—
CONTRIBUTORY NEGLIGENCE. In an action by a bicyclist, against a
city for personal injuries sustained by running against an obstruc-
tion in the street, the negligence of the city and the contributory
negligence of the plaintiff is for the jury, where it appears that
piles of soft mud, two feet high, from the construction of a sewer,
were allowed to remain in a street for three days and were dangerous
to all traveling in vehicles, that the night was dark and there were
no lights or barriers, and the plaintiff, who was infirm, had no light
on his bicycle. *Dunkin v. Hoquiam*..... 47

MURDER:

See HOMICIDE.

NAMES:

Of corporations, see **CORPORATIONS**, 1.

Designation of person in indictment, see **INDICTMENT AND INFORMATION**, 4.

NAVIGABLE WATERS:

Franchise to maintain wharf on city water front property, see **MUNICIPAL CORPORATIONS**, 9-11.

Disposal of state tide lands, see **PUBLIC LANDS**, 2-4.

Bodies and streams of water not capable of navigation, see **WATERS AND WATER COURSES**.

Power of city to authorize construction and maintenance of wharves, see **WHARVES**.

1. **NAVIGABLE WATERS—COMMERCE—POSSESSION OF TIDE LANDS UNDER STATE DEED.** A state deed of oyster lands, granting exclusive possession and preventing strangers from passing over the same by boat, is not a substantial impairment of the interests of the public in navigable waters or an interference with the Federal right to regulate commerce. *Palmer v. Peterson*..... 74

NAVIGATION:

See **NAVIGABLE WATERS**.

NEGLIGENCE:

Personal injuries to passengers in general, see **CARRIERS**, 8-13.

Contributory negligence of intoxicated passenger, see **CARRIERS**, 13.

Damages in general, see **DAMAGES**.

As ground of estoppel, see **ESTOPPEL**.

Defects or obstructions in highway, see **HIGHWAYS**, 6.

Of employers, see **MASTER AND SERVANT**.

Contributory negligence of servant, see **MASTER AND SERVANT**, 9-14.

Risks assumed by servant, see **MASTER AND SERVANT**, 8, 9, 12.

Of person injured by defects or obstructions in street, see **MUNICIPAL CORPORATIONS**, 13.

Injuries from defects or obstruction in streets, see **MUNICIPAL CORPORATIONS**, 12, 13.

Care required as to animals on or near railroad tracks, see **RAILROADS**.

Of person injured by street car, see **STREET RAILROADS**.

1. **NEGLIGENCE—CONTRIBUTORY NEGLIGENCE—INTOXICATION — INSTRUCTIONS.** Upon an issue as to plaintiff's contributory negligence, it is not error to refuse to instruct the jury as to the effect of plaintiff's intoxication, where the only evidence on that subject was that of a witness who saw him "about half jagged" four or five hours before the accident, and who did not know whether he was drunk or not. *Dunkin v. Hoquiam*..... 47
2. **NEGLIGENCE—INSTRUCTIONS—BURDEN OF PROOF.** The burden of proof is sufficiently defined by an instruction that the happening of

NEGLIGENCE—CONTINUED.

an accident did not show negligence, but the burden was upon the plaintiff to show it by a preponderance of the evidence, and he could not recover if the evidence was evenly balanced. *Hale v. Crown Columbia Pulp and Paper Co.*..... 236

NEGOTIABLE INSTRUMENTS:

See **BILLS AND NOTES.**

NEWLY DISCOVERED EVIDENCE:

See **NEW TRIAL, 3.**

NEWSPAPERS:

Service of process by publication, see **PROCESS.**

Publication of process in foreclosure action, see **TAXATION, 3, 4.**

NEW TRIAL:

Review of discretionary ruling on motion, see **APPEAL AND ERROR, 23.**

Questions considered on appeal from decision on motion, see **APPEAL AND ERROR, 20.**

Right to remit excessive verdict on failure to comply with decision affirming conditional new trial, see **APPEAL AND ERROR, 35.**

1. **NEW TRIAL—GROUNDS—EXCESSIVE VERDICT.** It is the duty of the trial court to grant a new trial where the verdict is so excessive as not to be sustained by the evidence. *Winningham v. Philbrick.* 38
2. **NEW TRIAL—EXCESSIVE VERDICT—DISCRETION OF TRIAL JUDGE—APPEAL—REVIEW.** A remark by the trial judge to the effect that when the verdict was first returned he considered it excessive, but later concluded that he might be wrong and the verdict not excessive, does not show that the party was entitled to a new trial as a matter of right because of an excessive verdict; and the refusal of a new trial will not be reversed where no abuse of discretion appears. *Columbia and Cowlitz River Boom and Rafting Co. v. Hutchinson* 323
3. **NEW TRIAL—NEWLY DISCOVERED EVIDENCE.** A new trial for newly discovered evidence is properly refused where the evidence merely tended in a slight degree to impeach the evidence of the prosecuting witness. *State v. Gaasch.*..... 381
4. **NEW TRIAL—IMPEACHING VERDICT—AFFIDAVITS.** A new trial should not be granted on the affidavit of a railroad company's claim agent that a juror told him that the verdict would have been different had certain evidence been admitted or excluded, where the same is denied by the juror. *Mueller v. Washington Water Power Co.* 556
5. **NEW TRIAL—ACCIDENT OR SURPRISE—ABSENCE OF WITNESS.** A new trial should not be granted for accident or surprise on account of the absence of a material witness, where it appears that he was present

NEW TRIAL—CONTINUED.

on the first day of the trial, and asked to be excused to go out of the state, expecting to return in time, and the adverse party offered to allow him to be sworn out of his turn, which offer was declined and the witness was excused and did not get back in time, especially where there was evidence given similar to that expected from the witness, and his absence was accounted for. *Mueller v. Washington Water Power Co.*..... 556

6. **NEW TRIAL—CONDITIONAL GRANT—EXPIRATION OF CONDITION.** Upon the expiration of the time limited within which a remission of part of a verdict could be accepted to avoid a conditional grant of a new trial, the order for a new trial becomes absolute and finally fixes the rights and status of the parties without further orders. *Winningham v. Philbrick*..... 38

NOMINAL DAMAGES:

See DAMAGES, 1.

NOTES:

Promissory notes, see **BILLS AND NOTES**.

NOTICE:

Of judgment as fixing time to appeal, see **APPEAL AND ERROR**, 9, 10.

Of appeal, see **APPEAL AND ERROR**, 10.

To purchaser of construction by parties of conflicting calls in description, see **BOUNDARIES**, 3.

Of lease as estoppel in action for breach of covenant against encumbrances, see **COVENANTS**.

For hearing of election contest, see **ELECTIONS**.

Judicial notice, see **EVIDENCE**, 2, 3.

Of lien claim, see **MECHANICS' LIENS**.

Mineral relocation notice, see **MINES AND MINERALS**.

Of party wall agreement, see **PARTY WALLS**, 3.

In foreclosure of delinquency tax certificate, see **TAXATION**, 3, 4.

Of findings and entry of judgment, see **TRIAL**, 5.

Affecting bona fides of purchaser of land, see **VENDOR AND PURCHASER**, 11.

Intent to declare forfeiture of contract, see **VENDOR AND PURCHASER**, 4, 5.

OBJECTIONS:

Review as dependent on objection or exception made on trial, see **APPEAL AND ERROR**, 6-8, 19.

To capacity of minor to sue and waiver thereof, see **PARTIES**.

To pleadings and waiver thereof, see **PLEADING**, 7.

OBSTRUCTIONS:

Of highways, see **HIGHWAYS**, 6.

OCCUPATION:

Sufficiency of occupation to constitute adverse possession, see **ADVERSE POSSESSION**.

OFFICERS:

Effect of death of corporate officer, see **ABATEMENT AND REVIVAL**.

Authority and liability of corporate officers, see **CORPORATIONS**, 7, 8, 10, 11.

Embezzlement by, see **EMBEZZLEMENT**, 1-4.

Municipal officers, see **MUNICIPAL CORPORATIONS**, 1-5.

OPINIONS:

In civil actions, see **EVIDENCE**, 7, 14.

Conclusion of witness as to dying declaration, see **HOMICIDE**, 2.

ORAL CONTRACTS:

See **FRAUDS, STATUTE OF**.

Oral promise for written contract, see **CONTRACTS**, 1, 4.

ORAL EVIDENCE:

See **EVIDENCE**, 4, 9-13.

ORDERS:

Review of appealable orders, see **APPEAL AND ERROR**, 3-4.

ORDINANCES:

Municipal ordinances, see **MUNICIPAL CORPORATIONS**, 8, 9, 11.

OYSTER LANDS:

Disposal of, see **PUBLIC LANDS**, 2, 4.

PARENT AND CHILD:

Adoption of children, see **ADOPTION**.

Custody and support of children on divorce, see **DIVORCE**, 6.

1. **PARENT AND CHILD—RIGHT TO CUSTODY—ADOPTION.** In deciding the right to a child as between a mother who had abandoned it, and adoptive parents, the pecuniary standing of the parties is not to be considered; but the welfare of the child is of grave importance and may be made controlling. *In re Fields*..... 259
2. **SAME—EVIDENCE—SUFFICIENCY.** A mother is not entitled to the custody of her boy, and the same should be left in the custody of foster parents, where it appears that the child was illegitimate and had been abandoned in infancy to a foundling hospital and a release signed; that *habeas corpus* proceedings by the mother to secure possession were abandoned by her, and nothing done for ten years, during which time the child had been brought up by foster parents and an attachment and environment created distinctly different from what would be the case in a change of guardianship, and the mother was unable to give him as good a home or attention as he now had. *In re Fields*..... 259

PAROL AGREEMENTS:

In general, see **CONTRACTS**.

Effect and requirements of statute of frauds, see **FRAUDS, STATUTE OF**.

PAROL EVIDENCE:

See **EVIDENCE**, 4, 9-13.

Proof of contract of sale, see **SALES**, 4.

PARTIES:

Death as ground for abatement, see **ABATEMENT AND REVIVAL**.

Entitled to alleged error, see **APPEAL AND ERROR**, 18, 19.

Persons entitled to appeal, see **APPEAL AND ERROR**, 5.

Construing conflicting calls in description, see **BOUNDARIES**, 2, 3.

Rights and liabilities as to costs, see **COSTS**.

In condemnation proceedings, see **EMINENT DOMAIN**, 11, 12.

Estoppel to claim benefit of admissions in pleading, see **HUSBAND AND WIFE**, 4.

Parties to judgment, see **JUDGMENT**, 4.

Persons concluded by judgment, see **JUDGMENT**, 2, 4.

Enjoining proceedings for recall of city councilman, see **MUNICIPAL CORPORATIONS**, 1.

Mandamus to compel sale of bonds to pay judgment, see **WATERS AND WATER COURSES**, 3.

Competency as witnesses, see **WITNESSES**, 1-3.

1. **PARTIES—INFANTS—CAPACITY TO SUE—WAIVER OF OBJECTION.** Objection to the capacity of a minor to sue, appearing on the face of the complaint, is waived by failing to demur on that ground. *Hale v. Crown Columbia Pulp and Paper Co.*..... 236

PARTNERSHIP:

1. **PARTNERSHIP—RIGHTS OF PARTNERS—FRAUD.** A copartnership raises a strong fiduciary relation, requiring the utmost good faith and rendering a partner liable for false representations or concealment in securing a partnership settlement. *Salhinger v. Salhinger* 134
2. **PARTNERSHIP—SETTLEMENT—FRAUD.** A partnership settlement should be set aside for fraud where the parties to the action were brothers and partners, the plaintiff was in ill health and weak-minded and subject to the defendant's influence, and the defendant, who had been in active charge of the partnership, the property of which was of the value of sixty thousand dollars, represented it as valueless and the business without profit and thereby, and by his influence over the plaintiff, who relied on the statements, fraudulently secured the settlement with the plaintiff for a small sum; as such statements are representations of material facts, relied upon by the plaintiff to his injury. *Salhinger v. Salhinger*..... 134

PART PERFORMANCE:

To satisfy statute of frauds, see FRAUDS, STATUTE OF, 2.

PARTY WALLS:

Bona fide purchaser, see VENDOR AND PURCHASER, 11.

1. PARTY WALLS—COVENANTS RUNNING WITH LAND. An agreement to pay half the cost of a party wall, erected on the line, is in the nature of a covenant running with the land and binds successors in interest, with notice actual or constructive. *Hawkes v. Hoffman* 120
2. PARTY WALLS—IMPLIED CONTRACT. The use of a party wall, constructed on the line by the adjoining owner, raises no implied obligation to pay one-half of its cost, an express contract being necessary. *Hawkes v. Hoffman*..... 120
3. PARTY WALLS—NOTICE OF AGREEMENT—BONA FIDE PURCHASER. Notice that a party wall was built upon a division line by the person who owned the adjoining tract, and used by him, is not sufficient to put a purchaser upon inquiry as to an unrecorded party wall agreement which charged the land purchased with one-half the cost of the wall. *Hawkes v. Hoffman*..... 120

PATENTS:

For public lands, see PUBLIC LANDS, 1.

PAYMENT:

See COMPROMISE AND SETTLEMENT; TENDER.

Subscriptions for stock, see CORPORATIONS, 5.

Compensation for property taken for public use, see EMINENT DOMAIN, 12, 13.

Application of proceeds of foreclosure sale to payment of notes secured by mortgage, see MORTGAGES, 10.

Subrogation on payment, see SUBROGATION.

Price of land sold, see VENDOR AND PURCHASER, 2-6.

1. PAYMENT—APPLICATION—FAILURE TO DIRECT. Where a defendant in two suits paid \$600 to the attorneys representing the plaintiffs in both suits, upon an agreement that both suits be dismissed, defendant cannot claim error in the application of half the sum to each claim, where she failed to direct the application at the time of payment. *Beyer v. Bullock*..... 110

PERFORMANCE:

Of contract of sale, see SALES.

Of contract for sale of land, see VENDOR AND PURCHASER.

PERMISSIVE USE:

Of road, see HIGHWAYS, 2, 3.

PERSONAL INJURIES:

See ASSAULT AND BATTERY; NEGLIGENCE.

To passenger, see CARRIERS, 8-13.

Inadequate and excessive damages, see DAMAGES, 2-5.

Physical exhibitions as reversible error, see EVIDENCE, 1.

To employee, see MASTER AND SERVANT.

From defects or obstructions in street or public place, see MUNICIPAL CORPORATIONS, 12, 13.

Release of claim for damages, see RELEASE.

To persons on or near street railroad tracks, see STREET RAILROADS.

PERSONAL PROPERTY:

Situs for taxation, see TAXATION, 1, 2.

PETITION:

For certiorari, see CERTIORARI, 3.

For condemnation of land, see EMINENT DOMAIN, 5.

PHOTOGRAPHS:

As evidence of handwriting, see FORGERY, 1.

PHYSICAL EXHIBITIONS:

In action for personal injuries, see EVIDENCE, 1.

PHYSICIANS AND SURGEONS:

Physical examinations at trial, see TRIAL, 1.

PLACE:

Delivery of goods sold, see SALES, 1.

Of taxation, see TAXATION, 1, 2.

PLEA:

In criminal prosecutions, see CRIMINAL LAW, 2-5.

In civil actions, see PLEADING.

PLEADING:

In civil action for assault, issues and proof, see ASSAULT AND BATTERY.

In action for injuries to passengers, see CARRIERS, 10.

For breach of contract, see CONTRACTS, 4.

On subscriptions to stock, see CORPORATIONS, 5.

Pleas in criminal prosecution, see CRIMINAL LAW, 2-5.

For damages in general, see DAMAGES, 6.

In action for divorce, see DIVORCE, 1, 4.

In action of ejectment, see EJECTMENT.

In condemnation proceedings, see EMINENT DOMAIN, 5.

Statute of frauds, see FRAUDS, STATUTE OF, 3.

To establish highways, see HIGHWAYS, 3.

Criminal prosecutions, see INDICTMENT AND INFORMATION.

Conformity of judgment to pleadings, see JUDGMENT, 6.

PLEADING—CONTINUED.

Actions for libel or slander, see **LIBEL AND SLANDER**, 2.

For injuries from defects or obstructions in streets, see **MUNICIPAL CORPORATIONS**, 12.

Mode of objection for defects as to parties, see **PARTIES**.

In quo warranto proceedings, see **QUO WARRANTO**.

In suit for specific performance, see **SPECIFIC PERFORMANCE**.

1. **PLEADING—DEMURRER—JOINDER IN.** A general demurrer by two or more defendants should be overruled if the complaint states a good cause of action against either defendant. *Beyer v. Bullock* 110
2. **PLEADING—ANSWER—AFFIRMATIVE DEFENSE—SUFFICIENCY.** A so-called affirmative defense reiterating facts appearing on the face of the complaint, and challenging their legal sufficiency, is properly stricken as presenting no issue. *Stone v. Insurance Co. of North America* 427
3. **PLEADINGS—AMENDMENTS AT TRIAL—TERMS—COSTS—DISCRETION.** It is discretionary, on a claim of surprise and inability to proceed with the trial, to refuse leave to amend an answer bringing in a new issue, unless defendants pay all costs, including witness and jury fees that have been paid. *Neilsen v. Hovander*..... 93
4. **PLEADINGS—AMENDMENT AT TRIAL.** Error cannot be predicated on the allowance of a trial amendment to the complaint, when no continuance was asked and no abuse of discretion shown. *Hudson v. Ellsworth* 243
5. **PLEADING—AMENDMENT—ALLOWANCE.** It is not error to refuse to permit the filing of an amended answer contradicting an admission in the original answer, unless good cause is shown for the change. *Stone v. Insurance Co. of North America*..... 427
6. **PLEADING—AMENDMENTS—TRIAL—STIPULATED FACTS.** Upon a trial upon stipulated facts, the complaint is deemed amended to conform to the stipulation. *O'Connor v. Enos*..... 448
7. **PLEADINGS—WAIVER OF OBJECTIONS—AIDED BY JUDGMENT—DEFAULTS.** Technical objections to a complaint that might have been taken by demurrer or motion are waived by default in appearance, and the complaint will be liberally construed after judgment, although the judgment was by default. *Ramey v. Smith*..... 604

PLEDGES:

1. **PLEDGES—COLLATERAL SECURITY—ACTION BY PLEDGEE—LIMIT OF RECOVERY—BILLS AND NOTES.** The indorsee of a note, taken by him as collateral to a loan, is the owner of the note, and may recover the full amount, regardless of the state of his account with the indorser, in the absence of any defense against the indorser. *Hillman v. Stanley*..... 320

POLICE JUSTICES:

Selection from justice of the peace, see **COURTS**, 1.

POLICY:

Of insurance, see **INSURANCE**.

POSSESSION:

See **ADVERSE POSSESSION**.

Of land as part performance to satisfy statute of frauds, see **FRAUDS**,
STATUTE OF, 2.

Exclusive right to possession of oyster lands under state deed, see
PUBLIC LANDS, 2.

PRACTICE:

See **APPEAL AND ERROR**; **CERTIORARI**; **CONTINUANCE**; **COSTS**; **CRIMINAL
LAW**; **JUDGMENT**; **MANDAMUS**; **NEW TRIAL**; **PLEADING**; **QUO WAR-
RANTO**; **TENDER**; **TRIAL**.

PREFERENCES:

By insolvent corporation, see **CORPORATIONS**, 16.

PREJUDICE:

Ground for reversal in civil actions, see **APPEAL AND ERROR**, 30-33.

Ground for reversal in criminal prosecution, see **CRIMINAL LAW**, 23.

PREMEDITATION:

Instructions as to time for, see **HOMICIDE**, 5.

PRESCRIPTION:

Establishment of highways, see **HIGHWAYS**, 1-3.

PRESENTMENT:

Of bill or note, see **BILLS AND NOTES**, 5.

PRESUMPTIONS:

In criminal prosecutions, see **CRIMINAL LAW**, 4.

As to valid service of process, see **JUDGMENT**, 1.

Arising from reputation and cohabitation, see **MARRIAGE**, 1.

PRICE:

Vacation of sale for inadequacy of, see **JUDICIAL SALES**, 1.

PRINCIPAL AND AGENT:

See **BROKERS**.

Death of corporate agent or officer, see **ABATEMENT AND REVIVAL**.

Representation of corporation by agent, see **CORPORATIONS**, 11.

Embezzlement by agent, see **EMBEZZLEMENT**, 5-8.

PRINCIPAL AND SURETY:

Liability of indorser as surety, see **BILLS AND NOTES**, 3.

PRIORITY:

Of mechanics' lien, see **EXEMPTIONS**.

PROCESS:

On appeal, see **APPEAL AND ERROR**, 10.

To sustain judgment, see **JUDGMENT**, 1.

Notice of proceedings for judgment for delinquent taxes, see **TAXATION**, 3, 4.

1. **PROCESS—SERVICE BY PUBLICATION—FILING SUMMONS.** The original summons for publication need not be filed, but jurisdiction is conferred by the publication and proof of service, under Bal. Code, § 4882, providing that the proof of services shall consist of the affidavit of the publisher and a printed copy of the summons. *Security Savings Society v. Collins*..... 455
2. **SAME—PUBLICATION—SUFFICIENCY OF SUMMONS.** A summons for publication requiring the defendant to appear in the alternative within sixty days after service, or within sixty days after the first publication, which was stated, while not to be commended, sufficiently complies with Bal. Code, § 4878. *Security Savings Society v. Collins* 455

PROHIBITION:

Preventing hearing on injunction after supersedeas and stay of proceedings, see **APPEAL AND ERROR**, 11.

1. **PROHIBITION—TO COURTS—TO RESTRAIN TRIAL PENDING APPEAL IN HABEAS CORPUS.** Prohibition will not issue to prevent the superior court from proceeding with the trial of an offense of which it has jurisdiction, pending the hearing of an appeal from an order denying a release by *habeas corpus*, as no stay of proceedings is given in such a case. *State ex rel. Hamilton v. Superior Court*..... 91

PROMISE:

Promise to repair defects in machinery or appliances, see **MASTER AND SERVANT**, 8.

PROMISE OF MARRIAGE:

See **BREACH OF MARRIAGE PROMISE**.

PROMISSORY NOTES:

See **BILLS AND NOTES**.

PROPERTY:

Adverse possession, see **ADVERSE POSSESSION**.

Taking for public use, see **EMINENT DOMAIN**.

PROXIMATE CAUSE:

Of injury to servant, see **MASTER AND SERVANT**, 3, 11, 12.

PUBLICATION:

Service of process, see **PROCESS**; **TAXATION**, 3, 4.

PUBLIC IMPROVEMENTS:

By cities, see **MUNICIPAL CORPORATIONS**, 6-8.

PUBLIC LANDS:

Validity of agreement to enter land in trust for another, see **CONTRACTS**, 3.

Interests in as separate or community property, see **HUSBAND AND WIFE**, 1.

Mineral lands, see **MINES AND MINERALS**.

Enforcing performance of contract relating to public lands, see **SPECIFIC PERFORMANCE**, 1.

1. **PUBLIC LANDS—HOMESTEAD—TITLE—WHAT LAW GOVERNS.** While the laws of the United States control the ownership until title passes, after the patent to government land is issued, it becomes subject to state legislation, and the state, in passing the community property law and providing the rule of descent, is not acting in contravention of the laws of the United States. *Krieg v. Lewis*... 196
2. **PUBLIC LANDS—OYSTER LANDS—STATE CONVEYANCE—RIGHT TO POSSESSION—INJUNCTION.** A state deed of oyster lands, covered and uncovered by the flow of the tide, grants the exclusive right to possession, and the owner may maintain an action to restrain any person from entering upon or passing over the same, either upon foot or by boat. *Palmer v. Peterson*..... 74
3. **PUBLIC LANDS—STATE DEED—COLLATERAL ATTACK.** A state deed of tide lands cannot be collaterally attacked on account of alleged defects in assignments of the land contract to the grantee, after the commissioner of public lands has approved the assignments and issued the deed. *Price v. Loe*..... 253
4. **PUBLIC LANDS—SALE—LANDS SUBJECT TO SALE—OYSTER BEDS—FINDING OF COMMISSIONERS—EFFECT—FRAUD IN APPLICATION FOR SALE.** Where the law required the state oyster commission to examine all natural oyster beds and establish reserves, and the commission established reserves in the vicinity of certain lands which were excluded from the reserve, making the same subject to sale, and such lands were afterwards sold by the state, the state is concluded by the acts of the commissioners, who are presumed to have done their duty, in the absence of fraud or improper motive on their part, and cannot attack the deeds on the ground that the original applicants for the land knew that the same contained natural oyster beds and had made false affidavits to secure the sale of the land. *State v. Heuston* 268

PUBLIC POLICY:

Contracts against public policy, see **CONTRACTS**, 3.

As affecting performance of contract, see **SPECIFIC PERFORMANCE**, 1.

PUBLIC USE:

Taking property for public use, see EMINENT DOMAIN.

PUBLIC WATER SUPPLY:

See WATERS AND WATER COURSES, 4, 5.

QUASHING:

Attachment, see ATTACHMENT.

QUESTION FOR JURY:

Promise of marriage, see BREACH OF MARRIAGE PROMISE, 1.

Passenger's use of pass, see CARRIERS, 8.

Words intended as insult to passenger, see CARRIERS, 7.

In criminal prosecutions, see CRIMINAL LAW, 10.

In action for injuries to servant, see MASTER AND SERVANT, 9, 13, 14.

Negligence of city or person injured by obstruction in street, see MUNICIPAL CORPORATIONS, 13.

QUIETING TITLE:

1. QUIETING TITLE—CLOUD—INVALID CLAIM. Under Bal. Code, § 5521, for the determination of adverse claims, a decree to quiet title may be had where the defendant filed for record an invalid notice, claiming a contract for purchase, although the claim did not constitute a cloud within equitable principles. *McGuinness v. Hargiss*..... 162

QUO WARRANTO:

Remedies of city for nonpayment of rent under franchise to maintain wharf, see MUNICIPAL CORPORATIONS, 11.

1. QUO WARRANTO—MOTION TO QUASH—DEMURRER. A motion to quash a quo warranto, upon the ground that the information did not state sufficient facts to entitle the relator to the relief prayed, may properly be treated as a demurrer to the information. *State ex rel. Port Angeles v. Morse*..... 654

RAILROADS:

Carriage of goods and passengers, see CARRIERS.

Exercise of power of eminent domain, see EMINENT DOMAIN.

Injuries to employees from defective equipment of cars, see MASTER AND SERVANT, 12.

Injuries to persons on or near street railway tracks, see STREET RAILROADS.

1. RAILROADS—INJURY TO STOCK—CATTLE GUARDS—EVIDENCE—SUFFICIENCY. In an action against a railroad company for killing a horse on or near a private farm crossing, the evidence is insufficient to show that the horse was killed on the right of way or through negligence in maintaining insufficient cattle guards, where no one saw the accident, there had been horses on the right of way the day before, and the horse was found the next morning about 100 yards from the crossing lying down in a field with a broken leg, and the

RAILROADS—CONTINUED.

only evidence indicating that the horse had been on the right of way consisted of the fact that there were tracks there as of a horse running for a considerable distance to within a few feet of the cattle guard, and indications that a horse had fallen on the crossing near the track; as such facts are consistent with the theory that it was struck on the crossing. *Byrne v. Spokane & Inland R. Co.*.. 667

RAPE:

Charging time of offense, see **INDICTMENT AND INFORMATION**, 3.

1. **RAPE—COMPLAINTS BY PROSECUTRIX—EVIDENCE—ADMISSIBILITY.** In a prosecution for rape of a child nine years of age, in the last of February or first of March, complaints made by the child "about the first or middle of March" are seasonably made, and therefore admissible in evidence. *State v. Myrberg*..... 384

RATIFICATION:

Of act of corporate officer or agent, see **CORPORATIONS**, 11.

REAL ESTATE AGENTS:

See **BROKERS**.

REAL PROPERTY:

Rights of aliens, see **ALIENS**.

Laches as bar to action for recovery of, see **EQUITY**.

Sale of real estate of decedent to pay claims, see **EXECUTORS AND ADMINISTRATORS**.

Community or separate property, see **HUSBAND AND WIFE**.

Limitation of action for damages, see **LIMITATION OF ACTIONS**, 1.

Trespass on real property, see **TRESPASS**.

Conveyance, see **VENDOR AND PURCHASER**.

REASONABLE DOUBT:

Instructions as to reasonable doubt, see **CRIMINAL LAW**, 20.

REBATES:

To owners of property assessed for improvement, see **MUNICIPAL CORPORATIONS**, 8.

RECALL:

Of city councilman, see **MUNICIPAL CORPORATIONS**, 1-5.

RECEIVERS:

Of corporations in general, see **CORPORATIONS**, 13.

1. **RECEIVERS—FINAL ACCOUNTING—ORDER OF SALE—CONSTRUCTION.** An order for a receiver's final sale of assets embracing "all book accounts, bills, claims, lumber, logs, and all other personal property owned or claimed by said receiver," does not include cash on hand or items of money or property that the receiver took without author-

RECEIVERS—CONTINUED.

ity for his private use or wrongfully advanced to a company in which he was interested, not carried on the books or reported to the court, and the existence of which was not known to the court or creditors at the time of the sale; and the receiver is therefore properly required to account for the same as cash on hand. *Seattle Hardware Co. v. Waugh*..... 478

RECORDS:

Transcript on appeal or writ of error, see **APPEAL AND ERROR**, 13-17.
 Showing of plea of not guilty, see **CRIMINAL LAW**, 4, 5.
 Records as evidence, see **EVIDENCE**, 6-8.

RELEASE:

Discharge by compromise or settlement, see **COMPROMISE AND SETTLEMENT**.

1. **RELEASE—FRAUD IN SECURING—EVIDENCE—SUFFICIENCY.** In an action for personal injuries for which plaintiff had signed a written release in consideration of \$500 paid him upon a settlement nine days after the accident, there is no evidence of fraud warranting the setting aside of the settlement or the submission of the case to the jury, where it appears from the plaintiff's own testimony that his mind was clear and he was able to transact business, that no fraud was practiced upon him, that he asked no advice from physicians or friends although he had opportunity to do so, that he had an opportunity to read the papers, headed, "release of damages" but failed to do so, that a first offer of \$175 was raised to \$500 and accepted, and that he retained that sum, and that he dealt at arm's length with the defendant. *Garver v. Great Northern R. Co.*..... 519

RELIEF:

Decrees and judgments, see **JUDGMENT**, 6.

RELOCATION:

Of mining claims, see **MINES AND MINERALS**.

REMAND:

By appellate court for further proceedings, see **APPEAL AND ERROR**, 36.
 On appeal from conviction and improper sentence in prosecution for gambling, see **INDICTMENT AND INFORMATION**, 5.

REMISSION:

Of excess of judgment, see **APPEAL AND ERROR**, 35.

REMOVAL:

Of public officers, see **MUNICIPAL CORPORATIONS**, 1-5.

RENT:

See **LANDLORD AND TENANT**, 2-4.

REPEAL:

Of statute relating to drawing and summoning grand jury, see **GRAND JURY**, 2.

REPRESENTATION:

Representation of corporations by officers or agents, see **CORPORATIONS**, 11.

As estoppel in pais, see **ESTOPPEL**.

REPUTATION:

Of witness, see **WITNESSES**, 8.

RESCISSION:

Of contract for carriage of goods, see **CARRIERS**, 1.

Of contract for sale of goods, see **SALES**, 5, 6.

Of contract for sale of land, see **VENDOR AND PURCHASER**, 7.

RESERVATION:

In lease and rights of assignee, see **LANDLORD AND TENANT**, 1.

RES JUDICATA:

See **JUDGMENT**, 2-4.

Decision on appeal as law of the case on new trial in lower court, see **APPEAL AND ERROR**, 20, 34, 37.

RESTRICTIONS:

Violation of building restrictions, see **ADJOINING LANDOWNERS**.

REVENUE:

See **TAXATION**.

REVIEW:

See **HABEAS CORPUS**.

By higher court on appeal for errors or irregularities, see **APPEAL AND ERROR**.

Statutory writ of review, see **CERTIORARI**.

In criminal prosecution, see **CRIMINAL LAW**, 9, 23.

RIGHT OF WAY:

Killing live stock on, see **RAILROADS**.

RIPARIAN RIGHTS:

Reasonable use of water, see **WATERS AND WATER COURSES**, 1, 2.

RISKS:

Assumed by employee, see **MASTER AND SERVANT**, 8, 9, 12.

ROADS:

See **HIGHWAYS**.

SALES:

By executor or administrator, see **EXECUTORS AND ADMINISTRATORS**.

To satisfy statute of frauds, see **FRAUDS, STATUTE OF**, 4, 5.

Of intoxicating liquors, see **INTOXICATING LIQUORS**.

On order or judgment of court, see **JUDICIAL SALES**.

Foreclosure sales, see **MORTGAGES**, 3-9.

For nonpayment of tax for public improvements, see **MUNICIPAL CORPORATIONS**, 6, 7.

Receiver's sales, see **RECEIVERS**.

Tax sales, see **TAXATION**, 3-5.

Of real property, see **VENDOR AND PURCHASER**.

Mandamus to compel sale of bonds by irrigation district, see **WATERS AND WATER COURSES**, 3.

1. **SALES—DELIVERY—PLACE.** An agreement to deliver cable at F., in Alaska, is not performed by delivering the same at C., ten miles distant from F. *Roebbling's Sons Co. v. Washington Alaska Bank* 102
2. **SALES—DELIVERY—ACCEPTANCE.** A delivery and acceptance of cedar poles sold, is shown, where it appears that at the time of the sale they were on a river bank, that each pole was marked with chalk on the end by the vendee's agent, who stated he would send a barge therefor, and the vendor agreed to load them on the barge. *Northern Mercantile Co. v. Schultz*..... 393
3. **SALES—VALIDITY—PERFORMANCE.** A sale of cedar poles is not affected by the fact that some were cut from dead trees, as that affected only the quality; nor by the fact that some were cut from the vendor's homestead claim prior to final proof. *Northern Mercantile Co. v. Schultz*..... 393
4. **SALES—RESTING IN PAROL—WRITTEN ESCROW—EVIDENCE TO VARY WRITING.** Where there was an oral sale of cable and other articles of a certain size, to be delivered at F., Alaska, before the close of navigation, upon which the purchase price was deposited in bank under a written escrow agreement which did not specify the time for delivery nor the size of the cable, the contract may be proved by parol, as the escrow was only for the purpose of defining the duties of the bank and did not purport to state all the terms of sale. *Roebbling's Sons Co. v. Washington Alaska Bank*..... 102
5. **SALES—RESCISSION—TIME FOR DELIVERY.** Upon the sale in August of goods to be delivered at F. in Alaska before the close of navigation, the vendees may rescind the sale in March for failure to deliver the goods before the close of navigation. *Roebbling's Sons Co. v. Washington Alaska Bank*..... 102
6. **SALES—PERFORMANCE—RESCISSION—DELIVERY AND CHARACTER OF GOODS.** Where, in order to secure wire cable before the close of navigation, the vendee agreed to take cable of a larger size than desired, then held in stock by the vendor, and agreed to pay the freight, and in the following March rescinded the sale for non-

SALES—CONTINUED.

delivery and ordered cable of the smaller size to be delivered by the first steamer, to which the vendor replied that the goods would be shipped by the first steamer, without specifying the size, the order was for the smaller size, justifying the vendees in refusing to accept larger cable on which the freight charges were \$400 in excess of charges on the smaller cable. *Roebling's Sons Co. v. Washington Alaska Bank* 102

7. **SALES—CONTRACT—ACTION FOR BREACH—DAMAGES.** Upon breach of a contract to deliver an engine within a specified time, damages may be recovered, notwithstanding that performance was rendered impossible by an earthquake and subsequent strikes of employees. *Isaacson v. Starrett*..... 18
8. **SALES—BREACH—DAMAGES—ACTION BY VENDOR—EVIDENCE—SUFFICIENCY.** The evidence is sufficient, as against a motion for nonsuit, to sustain an action for breach of a contract to sell land scrip, where the officers of the defendant corporation introduced the plaintiff's representative to one R. as its agent and representative for the purchase of scrip, that after negotiations, R. made a definite offer for scrip at a stated price, which was tendered to the defendant, and was satisfactory to the defendant's secretary, who asked that the scrip be held pending a telegram for funds, that defendant failed to secure funds and refused to complete the sale, and that the scrip cost plaintiff \$100,000 and plaintiff had been damaged in the sum of \$50,000. *Moses Land Scrip and Realty Co. v. Stack-Gibbs Lumber Co.* 529
9. **SALES—CONDITIONAL SALES—WAIVER OF CONDITION—PASSING OF TITLE.** Where the vendor in a conditional sale of a piano, after payments are made, elects to declare the whole sum due and recovers personal judgment against the vendees for the balance unpaid, the vendor waives his interest in the piano and the title vests in the vendees; and an allegation of a sale thereafter by the vendees to another, for value, sufficiently shows title in such other. *Ramey v. Smith*..... 604

SECONDARY EVIDENCE:

In civil actions, see **EVIDENCE**, 4.

SELF-SERVING DECLARATIONS:

See **EVIDENCE**, 5.

SERVICE:

Of process, see **PROCESS**.

SET-OFF AND COUNTERCLAIM:

Offset in action for breach of carriage of freight, see **CARRIERS**, 4.

SETTLEMENT:

See COMPROMISE AND SETTLEMENT; PAYMENT; RELEASE.
Fraud in partnership settlement, see PARTNERSHIP.

SHIPPING:

See MARITIME LIENS.
Carriage of goods, see CARRIERS, 1-5.
Construction of marine insurance policy, see INSURANCE, 1.

SITUS:

Of property subject to taxation, see TAXATION, 1. 2.

SLANDER:

See LIBEL AND SLANDER.

SPECIFIC PERFORMANCE:

1. SPECIFIC PERFORMANCE—ISSUES AND PROOF—EQUITY. Upon allegation and proof of a contract, made in ignorance of the fact that it was void as against public policy, whereby an entryman on arid land was to deed a part thereof to another after he had obtained title, a court of equity will not compel an assignment of part of the land to enable the trustee to enter and obtain the land himself by complying with the law. *McMillan v. Wright*..... 114
2. SPECIFIC PERFORMANCE—ACTIONS—DESCRIPTION. A contract to convey part of a tract of land cannot be specifically enforced where the specific portion to be conveyed is not designated. *McMillan v. Wright* 114

SPIRITUOUS LIQUORS:

See INTOXICATING LIQUORS.

STATEMENT OF FACTS:

See APPEAL AND ERROR, 13-17.

STATE PROPERTY:

See PUBLIC LANDS, 1.

STATES:

Grant of lands under navigable streams, see NAVIGABLE WATERS.

STATUTES:

See FRAUDS, STATUTE OF; MECHANICS' LIENS.
Construction of statute relating to erection of malicious structures, see ADJOINING LANDOWNERS, 2.
Construction of negotiable instruments act, see BILLS AND NOTES, 1, 2.
Contracts in violation of statute, see CONTRACTS, 3.
Construction of act relating to selection of police justices, see COURTS, 1.

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Construction of statutes relating to keeping of gambling resort, see **GAMING**.

Construction of statute relating to drawing and summoning grand jurors, see **GRAND JURY**.

Review on habeas corpus of judgment determining force or validity of, see **HABEAS CORPUS**, 4, 5.

Construction of act prohibiting sale of liquors to minors, see **INTOXICATING LIQUORS**, 1.

Statutes of limitation, see **LIMITATION OF ACTIONS**.

Acts superseding laws empowering cities to authorize construction of wharves, see **WHARVES**.

1. **STATUTES—CRIMINAL LAW—OPERATION—TIME OF TAKING EFFECT—EX POST FACTO LAWS.** The new criminal code (Laws 1909, p. 890), having provided in § 42 that nothing contained in any provision of the act shall apply to an offense committed or act done before the day when the act shall take effect, the former law (Bal. Code, § 7035) defining murder in the first degree was in full force and effect on May 14, 1909, although its prospective operation ceased after the taking effect of the new code; and no question of *ex post facto* laws can arise on a prosecution under the old law for an offense committed on that date. *In re Newcomb*..... 395

STAY:

Pending appeal or writ of error, see **APPEAL AND ERROR**, 11, 12.

STOCK:

Corporate stock, see **CORPORATIONS**, 4, 5, 7, 8, 12.

Injuries to animals on or near track, see **RAILROADS**.

STOCKHOLDERS:

Rights and liabilities, see **CORPORATIONS**, 6, 13, 14.

STREET RAILROADS:

Injuries to passengers, see **CARRIERS**, 8-11, 13.

Inadequate and excessive damages, see **DAMAGES**, 5.

Fellow servants in operation of street railroads, see **MASTER AND SERVANT**, 7.

1. **STREET RAILROADS—CROSSINGS—CONTRIBUTORY NEGLIGENCE OF PEDESTRIAN—DUTY TO LOOK AND LISTEN.** A pedestrian, struck at a crossing by a well lighted street car, at night, is guilty of contributory negligence, as a matter of law, although she testified that she looked east just a moment before stepping on the track and saw no car and heard no bell, where it appears that had she looked as she said she did she must have seen a lighted car about forty feet east of the crossing, approaching at ten miles an hour; since the rule that one need not stop, look and listen before crossing a street car track does not permit one to heedlessly and carelessly cross the

STREET RAILROADS —CONTINUED.

track; the rights of the parties being equal. *Helliesen v. Seattle Electric Co.* 278

2. SAME. In such case the test is, did the pedestrian use ordinary care, and the circumstances may be so conclusive as to make failure to look and listen, or such inattention as to know nothing of an approaching car, contributory negligence as a matter of law. *Helliesen v. Seattle Electric Co.*.....,..... 278

SUBROGATION:

In foreclosure action, see MORTGAGES, 1.

1. SUBROGATION—NATURE AND RIGHT—PAYMENT OF MORTGAGE. The right of subrogation applies to an owner of an undivided half interest in mortgaged property who tenders the mortgage debt with a view of saving his interest in the property; since subrogation requires no contract or privity and he is not a mere volunteer in discharging the debt of his co-owners. *Murray v. O'Brien*..... 361
2. SUBROGATION—PROCEEDINGS—MORTGAGES—PAYMENT BY PART OWNER. On the principle that a court of equity having acquired jurisdiction for one purpose will retain it for all purposes, a plaintiff in a suit for the foreclosure of a mortgage cannot object to any procedure whereby the owner of a half-interest in the property may, on tendering the debt, become subrogated to the plaintiff's rights against the co-owners. *Murray v. O'Brien*..... 361
3. SAME. In such a case it is not a valid objection by the mortgagee to such subrogation that the co-owners are willing to pay their part of the debt, since the mortgagee owes no duty to third persons, whom the court will protect by its orders; especially where there is nothing to show that privilege of payment was denied such parties. *Murray v. O'Brien*..... 361
4. SAME—SATISFACTION OF MORTGAGE—EFFECT—TENDER—POWER OF COURT TO ORDER SUBROGATION. It is unnecessary for the owner of a half interest in mortgaged property, acquired after commencement of the foreclosure suit, to begin a suit to enjoin satisfaction of the mortgage upon tender made, or to intervene in the action for the purpose of being subrogated to the rights of the mortgagee; since satisfaction of the debt would not destroy the right of subrogation, and upon payment into court, the court could enter an order recognizing the subrogation without any forfeiture of rights. *Murray v. O'Brien* 361

SUBSCRIPTION:

To corporate stock, see CORPORATIONS, 4, 5, 12.

SUMMONS:

See PROCESS.

In tax foreclosure, see TAXATION, 3, 4.

SUPERSEDEAS:

On appeal or writ of error, see **APPEAL AND ERROR**, 11, 12.

SUPPLEMENTARY PROCEEDINGS:

On execution, see **EXECUTION**.

SUPPLIES:

Maritime liens for supplies to vessel, see **MARITIME LIENS**.

SURPRISE:

See **NEW TRIAL**, 5.

TAXATION:

Annual corporation tax, see **CORPORATIONS**, 1.

Assessments for municipal improvements, see **MUNICIPAL CORPORATIONS**, 6-8.

1. **TAXATION—PERSONAL PROPERTY—SITUS—STEAM DREDGER.** A dredger built in, and engaged for two years in government work, in a county of this state, has its situs for taxation in this state, although its home port and ownership is in another state; and the fact that it was seaworthy and had sufficient power to propel itself on the high seas does not bring it within the rule requiring vessels engaged in interstate traffic or sailing from one port to another to be assessed at their home ports or the domicile of her owners. *North American Dredging Co. v. Taylor*..... 565
2. **SAME—OWNERS—INTENTION TO REMOVE FROM STATE.** The use of a dredger for indefinite periods in a harbor where it may be engaged in work impresses it with a local character, and the declared intention of its nonresident owners to remove it from the state as soon as its contract for work is completed, does not exempt it from taxation at the place where found. *North American Dredging Co. v. Taylor* 565
3. **TAXATION—FORECLOSURE—PROCESS—SERVICE OF PUBLICATION—RESIDENT DEFENDANT.** The foreclosure of a tax certificate is void where there was no attempt made to personally serve the defendant, who lived in the city and whose name and address was in the city directory, and service was had by publication upon an attorney's affidavit of nonresidence and the sheriff's return of not found, made immediately upon presenting the summons at the sheriff's office without any attempt to find or serve the defendant. *Olson v. Johns*..... 12
4. **TAXATION—FORECLOSURE—VALIDITY—PROCESS—SERVICE ON PARTIES NOT INTERESTED.** A foreclosure of a tax delinquency certificate, under the act of 1899, which did not define the owner or authorize proceedings against the persons appearing as owners on the tax rolls, is void, where the action proceeded upon personal service against defendants who had no interest in the land, and no publica-

TAXATION—CONTINUED.

tion was had against unknown owners or any other service had; as the owner never had his day in court. *Jones v. Seattle Brick & Tile Co.* 166

5. **TAXATION—DECREE AND DEED—DEFINITENESS—DESCRIPTION—LIBERAL CONSTRUCTION.** A description in a tax foreclosure and deed of a lot "less west two feet," where the boundary lines varied about twelve degrees from due north and south, is a sufficiently definite description of the lot, less two feet cut off by a north and south line, measured from the most westerly point of the lot, under a liberal construction of the provision of Laws 1899, p. 301, requiring the sale of land for taxes to be made by selling a portion off the east side of the tract, determined by "a line drawn due north and south far enough west of the eastern point of the tract to make the requisite quantity." *Lara v. Peterson*..... 70

TAXATION OF COSTS:

See Costs.

TENDER:

Of cargo to shipper, when excused, see CARRIERS, 2.

Of amount due on mortgage as condition of discharging lien, see MORTGAGES, 11-13.

Right of co-owner to intervention and tender in foreclosure action, see MORTGAGES, 1.

Of mortgage debt and subrogation, see SUBROGATION.

Of price of land, see VENDOR AND PURCHASER, 2.

1. **TENDER—SOURCE OF MONEY—MATERIALITY.** Upon a tender of a mortgage debt, it is immaterial from what source the money comes. *Murray v. O'Brien*..... 361
2. **TENDER—CONSTRUCTION—CONDITIONS.** An unconditional tender cannot be measured by two qualified tenders made immediately before on the same day. *Murray v. O'Brien*..... 361
3. **SAME—TENDER AFTER SUIT BROUGHT—PURPOSE—CONSTRUCTION—EFFECT.** Where the owner of a half-interest in mortgaged property, acquired after suit for foreclosure was commenced, intervened and tendered the debt due, and asked for subrogation to the rights of the mortgagee, both in the foreclosure suit and in an independent action to enjoin cancellation of the mortgage, the tender should be considered as made in aid of the affirmative relief prayed for; and hence the same cannot be urged to secure a discharge of the mortgage lien and a consequent loss of the debt through a failure to present a claim therefor to an administrator, contrary to equity and to the relief originally sought. *Murray v. O'Brien*..... 361
4. **TENDER—NECESSITY OF KEEPING GOOD—EQUITY.** The rule at law that a tender must be kept good or paid into court does not apply in equity, as a willingness to pay may alone be sufficient; irrespec-

TENDER—CONTINUED.

tive of Bal. Code, §§ 5176, 5177, providing that money may be paid into court and thus arrest interest and costs. *Murray v. O'Brien* 361

5. **SAME—EFFECT IN EQUITY—ARRESTING INTEREST.** An unconditional tender of the amount due on a mortgage, after pleading a willingness to pay in full, which was refused by the mortgagee in the hope of gaining some personal advantage, arrests the interest from the date of the tender. *Murray v. O'Brien*..... 361

TERMS:

Of city office, see **MUNICIPAL CORPORATIONS**, 4, 5.

THREATS:

Confessions procured by threats, see **CRIMINAL LAW**, 8-11.
As evidence in prosecution for murder, see **HOMICIDE**, 4.

TIDE LANDS:

See **NAVIGABLE WATERS**.

Disposal of state tide lands, see **PUBLIC LANDS**, 2-4.

TIME:

For taking appeal or suing out writ of error, see **APPEAL AND ERROR**, 9.

For filing case or statement of facts on appeal or error, see **APPEAL AND ERROR**, 16, 17.

Extension of time of debtor as discharge of maker of note, see **BILLS AND NOTES**, 3.

Service of grand jury, see **GRAND JURY**.

Of commission of burglary, see **BURGLARY**.

Application for writ of certiorari, see **CERTIORARI**, 3.

Notice and hearing of election contest, see **ELECTIONS**, 2-4.

Acquisition of homestead, see **HOMESTEAD**.

Alleging time of commission of offense in indictment, see **INDICTMENT AND INFORMATION**, 3.

For application to vacate judgment, see **JUDGMENT**, 5, 7.

Computation of period of limitation, see **LIMITATION OF ACTIONS**.

For filing statement or claim for mechanic's lien, see **MECHANICS' LIENS**, 2.

For delivery of goods sold, see **SALES**, 5.

Of taking effect of statute, see **STATUTES**, 5.

TITLE:

By adverse possession, see **ADVERSE POSSESSION**.

Defect in title as defense in action for commissions, see **BROKERS**, 4.

Slander of title, see **LIBEL AND SLANDER**, 2.

Removal of cloud, see **QUIETING TITLE**.

Contracts creating conditions on transfer of title, see **SALES**, 9.

Sufficiency of title of vendor of land, see **VENDOR AND PURCHASER**, 8-10, 12.

TORTS:

- See ASSAULT AND BATTERY: LIBEL AND SLANDER; NEGLIGENCE.
- In carriage of passengers, see CARRIERS, 6-13.
- Damages for, see DAMAGES.
- Negligence in obstruction of highway, see HIGHWAYS, 6.
- Computation of period of limitation, see LIMITATION OF ACTIONS, 1.
- Of cities, see MUNICIPAL CORPORATIONS, 12, 13.
- Injury to animals on or near track, see RAILROADS.
- Injuries caused by operation of street cars, see STREET RAILROADS.
- Pollution of water course, see WATERS AND WATER COURSES, 1, 2.

TRESPASS:

- Right to jury trial in action to restrain trespass, see JURY, 1.
- Limitation of action for damages to real property, see LIMITATION OF ACTIONS, 1.
- 1. TRESPASS—AT COMMON LAW—LIMITATIONS. Whether an action is for a trespass upon real property, within the statute of limitations, depends upon what was deemed trespass at common law. *Welch v. Seattle and Montana R. Co.*..... 97

TRIAL:

- Review of rulings as dependent on prejudicial nature of error, see APPEAL AND ERROR, 30-33.
- Review of discretionary action, see APPEAL AND ERROR, 23, 24.
- Review of rulings as dependent upon presentation of exception or objection in lower court, see APPEAL AND ERROR, 6-8, 19.
- Review of rulings as dependent on presentation of same by record, see APPEAL AND ERROR, 13-17.
- Instructions in action to recover for legal services, see ATTORNEY AND CLIENT, 2.
- Instructions in action by passenger for injuries, see CARRIERS, 6, 9, 11.
- Continuance in civil actions, see CONTINUANCE.
- In criminal prosecutions, see CRIMINAL LAW.
- Indorsement of witnesses at trial, see CRIMINAL LAW, 12-14.
- Proceedings in habeas corpus, see HABEAS CORPUS.
- Instructions in prosecution for selling liquor to minor, see INTOXICATING LIQUORS, 6.
- Right to trial by jury, see JURY.
- Instructions in action for personal injuries, see MASTER AND SERVANT, 1, 10; NEGLIGENCE.
- Motions and grounds for new trial, see NEW TRIAL.
- Amendment of pleading during trial, see PLEADING, 3-6.
- Attendance and examination of witnesses, see WITNESSES.
- 1. TRIAL—PHYSICAL EXAMINATION. It is not error to refuse to permit a physical examination of the plaintiff, during the trial of a personal injury case, where plaintiff was examined before the trial by physicians appointed by the court. *Dunkin v. Hoquiam*..... 47

TRIAL—CONTINUED.

2. **TRIAL—MISCONDUCT OF JUDGE.** Comment by the court in giving reasons for ruling on objections to the evidence is not unlawful comment thereon in violation of the constitution. *Dunkin v. Hoquiam* 47
3. **TRIAL—MISCONDUCT OF COUNSEL—APPEAL—HARMLESS ERROR.** It is not ground for reversal that on examining a photograph, counsel made a statement outside of the record that "timbers have been put on since." *Bennett v. Seattle Electric Co.* 407
4. **TRIAL—DECISION—TIME FOR RENDITION.** The superior court does not lose jurisdiction by failing to decide a cause within ninety days from the time it is submitted, as required by the constitution. *Olympic Oil Co. v. Kane* 199
5. **TRIAL—NOTICE OF FINDINGS AND JUDGMENT—EXCEPTIONS—TIME FOR TAKING.** Notice of the findings and entry of judgment need not be given, as exceptions may be taken until five days after notice is received. *Lindsay v. Scott* 206

TRIAL BY JURY:

See **JURY**.

TRIAL DE NOVO:

On appeal, see **APPEAL AND ERROR**, 18, 31, 32.

UNITED STATES:

Public lands, see **PUBLIC LANDS**, 1.

UTTERING:

Uttering forged instruments, see **FORGERY**.

VACATION:

Of attachment, see **ATTACHMENT**.

Of judgment, see **JUDGMENT**, 5, 7, 8.

Of sale for inadequacy of price, see **JUDICIAL SALES**, 1.

Sale under judgment or decree of foreclosure, see **MORTGAGES**, 2.

Of partnership settlement for fraud, see **PARTNERSHIP**.

VALUE:

Of land appropriated for public use as measure of compensation, see **EMINENT DOMAIN**, 4.

VARIANCE:

Between pleading and proof in criminal prosecutions, see **INDICTMENT AND INFORMATION**, 4.

VENDOR AND PURCHASER:

Right of alien to hold realty, see **ALIENS**.

Bona fide purchaser, see **BOUNDARIES**, 3.

Compensation of broker procuring conveyance, see **BROKERS**.

Sale of property of decedents under order of court, see **EXECUTORS AND ADMINISTRATORS**.

Right of official to bid in property, see **JUDICIAL SALES**, 2.

Sales under foreclosure of mortgage, see **MORTGAGES**, 1-9.

City assessment foreclosure and sale, see **MUNICIPAL CORPORATIONS**, 6, 7.

Right of purchasers as to party walls, see **PARTY WALLS**.

Sale of state lands, see **PUBLIC LANDS**, 2-4.

Transfers of ownership of personal property, see **SALES**.

Specific performance of contract, see **SPECIFIC PERFORMANCE**.

1. **VENDOR AND PURCHASER—FRAUDULENT REPRESENTATIONS—EVIDENCE—SUFFICIENCY.** There is sufficient evidence to make out a *prima facie* case of fraud in the sale of land, where it was represented to be tillable and suitable for irrigation, with water rights and fifty or sixty acres under cultivation, half in alfalfa, and all fenced, when in fact, none had been prepared for cultivation, no water rights obtained, and the representations were false in other respects. *Bailie v. Parker*..... 353
2. **VENDOR AND PURCHASER—CONTRACT—DEFAULT—FORFEITURE.** Where a contract for the purchase of land provided for the payment of an installment and accrued interest on a certain date at a bank in A., and made time of the essence with the right to declare a forfeiture for default, mailing a draft at S. on the due date, for the amount due less interest, is not a sufficient tender, where three days was required for the mail to arrive at A., and notice of election to forfeit the contract may at once be given. *Garvey v. Barkley*..... 24
3. **SAME—ESTOPPEL TO DECLARE FORFEITURE.** The acceptance of the first installment upon a contract to purchase land, without accrued interest, does not estop the vendor from electing to declare a forfeiture on the purchaser's failure to pay the second installment with accrued interest, on the date it is due. *Garvey v. Barkley*..... 24
4. **VENDOR AND PURCHASER—CONTRACT—FORFEITURE—DEFAULT IN PAYMENT—WAIVER.** Where seventeen monthly installments on a land contract were paid and accepted from a few days to a few months after maturity, the vendors waive a provision making time of the essence of the contract, and a forfeiture could not thereafter be declared without demand for payment or specific notice. *Douglas v. Hanbury* 63
5. **SAME—NOTICE OF FORFEITURE—SUFFICIENCY.** After waiver of a provision making time of the essence of a contract to convey land, testimony by the vendor that he mailed a letter notifying the vendee of an installment falling due, and that he must be ready with the

VENDOR AND PURCHASER—CONTINUED.

money, is not sufficient to show notice of a specific intent to declare a forfeiture, receipt of the letter being denied. *Douglas v. Hanbury* 63

6. VENDOR AND PURCHASER—CONTRACT—FORFEITURE—DEPENDENT AGREEMENTS. Where land was sold under a time contract for payment by installments, time being of the essence, and by the contract the vendor agreed to give an abstract, continued to date of delivery of the deed, and all the intermediate installments were paid, the vendor cannot declare a forfeiture for failure to pay the last installment when due, unless he has put the vendee in default by tendering the abstract and deed; since the acts agreed upon are concurrent, and the agreements mutual and dependent as regards the final payment. *Reese v. Westfield*..... 415
7. VENDOR AND PURCHASER—RESCISSION BY VENDEE—RECOVERY OF PRICE. Where the vendees made captious and technical objections to the vendor's title for the purpose of preventing performance within the time limit, but time was not of the essence and the vendors tendered complete performance prior to any claim of forfeiture, the vendees cannot recover earnest money paid. *Price v. Loe*..... 252
8. VENDOR AND PURCHASER—TITLE OF VENDOR—SUFFICIENCY. A contract to furnish "a good title shown by abstract," is not performed, and the vendee is not compelled to accept the title, where the vendors claimed under a deed from certain persons claiming to be heirs of another, who died many years ago without administration on her estate, and there was nothing of record to show who were her heirs at law except the *ex parte* affidavit of her husband. *Crosby v. Wynkoop* 475
9. VENDOR AND PURCHASER—CONTRACTS—TITLE—MARKETABLE TITLE. A contract to sell land with a perfect title satisfactory to the purchaser only requires the furnishing of a good marketable title, and does not give the purchaser an arbitrary right to defeat the sale. *Dean v. Williams*..... 614
10. SAME—CONTRACT—PERFORMANCE—FAILURE OF TITLE. Upon failure of the vendors to make a title good, under a contract of sale providing that if the title is not good or cannot be made good in ten days the contract shall be null and void and all payments made refunded, the purchaser is entitled to a return of purchase money, but cannot recover damages for breach of contract to convey. *Crosby v. Wynkoop* 475
11. VENDOR AND PURCHASER—BONA FIDE PURCHASER—PARTY WALLS. The purchaser with notice of a party wall agreement, from a former purchaser without notice, may claim the immunity of his vendor. *Hawkes v. Hoffman*..... 120
12. SAME—FAILURE OF TITLE—MEASURE OF DAMAGES. The measure of damages for breach of a contract of sale by reason of failure of

VENDOR AND PURCHASER—CONTINUED.

the vendor's title, is the purchase price paid with interest, where the vendor acted in good faith and without intentional fault. *Crosby v. Wynkoop* 475

VERDICT:

Review on appeal or writ of error, see **APPEAL AND ERROR**, 25, 27-29.

In criminal prosecutions, see **CRIMINAL LAW**, 21, 22.

Excessive verdict as ground for new trial, see **NEW TRIAL**, 1. 2.

VICE PRINCIPALS:

See **MASTER AND SERVANT**, 8.

VOLUNTARY CONFESSIONS:

See **CRIMINAL LAW**, 8-11.

VOLUNTEERS:

Right to subrogation, see **SUBROGATION**, 1.

WAIVER:

Of error, see **APPEAL AND ERROR**, 21.

Of right of action on bond for wrongful attachment, see **ATTACHMENT**, 4.

Of right by accused to have copy of charge, see **CONSTITUTIONAL LAW**.

Proof of corporate existence, see **CORPORATIONS**, 3.

By election of remedy, see **ELECTION OF REMEDIES**.

Of objections to validity of supplemental proceedings, see **EXECUTION**.

By administratrix to deny valid deed or claim ownership after sale of property, see **EXECUTORS AND ADMINISTRATORS**, 2.

Of forfeiture of lease by acceptance of rent, see **LANDLORD AND TENANT**, 3, 4.

Of right to separate sale on foreclosure, see **MORTGAGES**, 5.

Defects in parties, see **PARTIES**.

Objections to pleadings waived by default in appearance, see **PLEADING**, 7.

Condition in conditional sale or of forfeiture for breach, see **SALES**, 9.

Right to declare forfeiture for nonpayment of installment, see **VENDOR AND PURCHASER**, 4.

WARRANTY:

Covenants of, see **COVENANTS**.

In policy of fire insurance, see **INSURANCE**, 2-4.

WATERS AND WATER COURSES:

Appointment of commissioner for irrigation district, see **COURTS**, 2.

Waters capable of navigation as public highways, see **NAVIGABLE WATERS**.

WATERS AND WATER COURSES—CONTINUED.

1. **WATERS AND WATER COURSES—RIPARIAN RIGHTS—POLLUTION—REASONABLE USE.** The owner of a small tract of land upon which there are springs, forming a pond about twenty feet wide by forty feet long, cannot be enjoined by a lower riparian owner from use of the same for a few geese, and horses and cattle at pasture, as the same is a reasonable use, and pollution of the stream thereby is a natural incident to proper and reasonable use thereof. *McEvoy v. Taylor* 357
2. **SAME—NONRIPARIAN OWNERS.** One who is not a riparian owner but who diverted the waters of a spring to his own land by pipes, cannot enjoin the pollution of the waters by an upper riparian owner who had used the waters on his own lands for ten years prior to the diversion. *McEvoy v. Taylor*..... 357
3. **WATERS—IRRIGATION DISTRICTS — MANDAMUS TO PAY JUDGMENT—NECESSARY PARTIES—STATUTES.** Under Laws 1895, p. 448, § 22 (Bal. Code, § 4201), authorizing the board of directors and secretary to receive and pay out the funds of an irrigation district, the district treasurer, as disbursing officer, is not a necessary party to proceedings in mandamus to compel the district to sell bonds to satisfy a judgment against the district. *State ex rel. Dyer v. Middle Kittitas Irrigation District* 488
4. **WATERS — WATER COMPANIES — FRANCHISE — COMPELLING PUBLIC SERVICE—DEFENSES—DEFAULT OF CITY.** The failure of a city to pay hydrant rental, through its inability to do so for the time being, stipulated for in a water company's franchise, is not a defense to an action by the state on behalf of the citizens to compel the water company to furnish water to the citizens pursuant to the obligations of the franchise, where the company had not abandoned its franchise or vacated the streets. *State ex rel. South Bend v. Mountain Spring Co.* 176
5. **SAME—ESTOPPEL.** In an action to compel a water company to supply water to citizens, the company is estopped to plead the indivisibility of the contract and to set up the default of the city to pay hydrant rentals, where, after determination that the city was powerless to pay the rentals, the company elected to proceed with that part of the contract eliminated and was claiming benefits under its franchise. *State ex rel. South Bend v. Mountain Spring Co.* 176

WAYS:

Public ways, see HIGHWAYS.

WHARVES:

Grant of franchise to maintain wharf, see MUNICIPAL CORPORATIONS, 9-11.

1. **WHARVES—RIGHT TO MAINTAIN — MUNICIPAL CORPORATIONS — TIDE LANDS.** The territorial act, Bal. Code, § 4077, providing that cities

WHARVES—CONTINUED.

may authorize the construction of a wharf at the terminus of a street, has been superseded by Const., art. 15, and the laws enacted in pursuance thereof for the sale, lease or control of tide lands and harbor areas by agents of the state, so far as the same affects tide lands not owned by the city or included in public streets extended over the tide lands. *State ex rel. Port Angeles v. Morse*..... 654

WITHDRAWAL:

Of plea of insanity, see **CRIMINAL LAW**, 3.

WITNESSES:

Examination in criminal prosecution, see **CRIMINAL LAW**, 18, 19.

Appointment at trial of expert to examine clothing worn by accused, see **CRIMINAL LAW**, 17.

Indorsement of witnesses on information, see **CRIMINAL LAW**, 12-14.

Weight and sufficiency of evidence in general, see **EVIDENCE**, 15.

Opinions, see **EVIDENCE**, 7, 14.

Opinion evidence as to decedents belief of impending death when making dying declaration, see **HOMICIDE**, 2.

Absence as ground for new trial, see **NEW TRIAL**, 5.

1. **WITNESSES — CAPACITY OF CHILD — DISCRETION—APPEAL—REVIEW.** Whether a child nine years of age has sufficient capacity to understand the nature of an oath and is competent to testify is a matter within the trial court's discretion, not to be disturbed on appeal except for abuse of discretion. *State v. Myrberg*..... 384
2. **WITNESSES—COMPETENCY—HUSBAND AND WIFE—CRIMES AGAINST OTHER SPOUSE—ARSON.** Under Bal. Code, § 5994, disqualifying a husband or wife from testifying against the other without the other's consent, except in certain cases and in criminal cases "for a crime committed by one against another," the wife is incompetent to testify against the husband without his consent in a prosecution for the crime of arson in the burning of a barn belonging to the wife; as the offense is not a crime committed against her. *State v. Kephart* 561
3. **SAME.** Bal. Code, §§ 7094, 7098, defining arson, and providing that a married woman commits the crime if the property set fire to belongs to her husband, creates no exception to the rule of evidence that one spouse cannot testify against the other, without the other's consent, except in prosecutions for crime committed by one against the other. *State v. Kephart*..... 561
4. **WITNESSES—TRANSACTIONS WITH DECEASED — WIFE'S TESTIMONY AS TO MARRIAGE.** The surviving wife, claiming an interest in lands of her deceased husband, is, under Bal. Code, § 3991, incompetent to testify as to the marriage or to any other transaction with the deceased. *Weatherall v. Weatherall*..... 344

WITNESSES—CONTINUED.

5. **WITNESSES—CROSS-EXAMINATION—IMPEACHMENT.** Upon a prosecution for selling liquors to a minor, in which the minor denied buying beer of the defendant on the day in question, it is proper impeachment to ask on cross-examination whether he had been drinking that evening. *State v. McCormick*..... 469
6. **WITNESSES—CROSS-EXAMINATION—CONVERSATION.** Where upon direct examination plaintiff gave parts of conversations with the defendant at certain times, it was proper on cross-examination to compel him to give all of the conversations at the times referred to. *Bruce v. Bevis*..... 547
7. **WITNESSES — EVIDENCE — HANDWRITING — TRIAL.** The practice of permitting a witness to illustrate his testimony, in comparing handwriting on a forged check with admitted handwriting, by illustrations on a blackboard cannot be commended, for the illustrations cannot be preserved in the record. *State v. Cottrell*..... 543
8. **WITNESSES—REPUTATION—APPEAL—HARMLESS ERROR.** It is not prejudicial error to allow a witness to preface his testimony with the statement that he was a deputy county assessor, in that good reputation cannot be shown until the same is attacked, as it only incidentally touched his reputation. *Bennett v. Seattle Electric Co.* 467

WORK AND LABOR:

Liens for work and materials, see **MECHANICS' LIENS.**

WRITINGS:

Oral promise for written contract, see **CONTRACTS**, 1, 4.
Oral evidence to establish lost writing, see **EVIDENCE**, 4.

WRITS:

See **CERTIORARI; HABEAS CORPUS; MANDAMUS; PROCESS; PROHIBITION; QUO WARRANTO.**

WRONGFUL ATTACHMENT:

Liability on bond for, see **ATTACHMENT**, 4.

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